IN THE

Supreme Court of the United States

October Term, 1966

No. 615

RALPH BERGER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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Opinions Below

The Court of Appeals of the State of New York affirmed the judgment without opinion, Chief Judge DESMOND and Judge FULD dissenting in an opinion reported at 18 N.Y.2d 638, 640 (1966).

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the judgment without opinion at 25 App. Div. 2d 718 (1966).

Questions Presented

In granting certiorari, the Court certified petitioner's phrasing of the questions as follows:

1. Assuming the basic Federal constitutionality of New York State's permissive eavesdrop legislation which allows electronic room eavesdropping or "bugging" by ex parte Court order (N. Y. Code Crim. Proc. §813-a), were the ex parte Court orders for the room eavesdrops in this particular case, without which this prosecution stipulatedly could not have been instituted or maintained, nevertheless invalid under the Fourth Amendment because not based upon an adequate showing of probable cause?

2. Is the New York ex parte permissive eavesdrop legislation (N. Y. Code Crim. Proc. §813-a) unconstitutional under the Federal Fourth, Fifth, Ninth and Fourteenth Amendments as setting up a system which intrinsically involves trespassory intrusion into private premises, "general" searches for "mere evidence" and invasion of the privilege against self-incrimination; and were the particular room eavesdrops here involved unconstitutional on those grounds?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Constitution, Article I, §12

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable grounds to believe that evidence of crime may be thus obtained, and identifying the particular means of communication and particularly describing the person or persons whose communications are to be intercepted and the purposes thereof.

New York Code of Criminal Procedure, §813-a

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the

issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

Statement

The defendant, a Chicago public relations man, was convicted, after a four-week trial (SCHWEITZER, J. and a jury) of two counts of CONSPIRACY TO BRIBE A PUBLIC OFFICIAL (New York Penal Law §§580, 378). On December 17, 1964 he was sentenced to one year in the Penitentiary on each count, the sentences to run concurrently.

The evidence established that Ralph Berger was a party to two separate agreements, each with the same object: the delivery of sums of money to a corrupt public official in return for which valuable liquor licenses would

be issued. The first instance involved the Playboy Club, seeking a license which would enable them to open on a membership basis. After numerous conferences with the officers of the organization which would operate the club, the petitioner solicited and agreed with Arnold Morton, Robert Preuss, Victor Lownes and Hugh Hefner that the most efficacious method of obtaining the license they sought was by a direct and unvarnished bribe to the Chairman of the State Liquor Authority, Martin Epstein, in the amount of $50,000. Forty-one thousand dollars of that sum was actually turned over in installments to Berger for transmission to the public official. In addition, the Playboy management laid out $16,500 plus "expenses" to Ralph Berger for his "services," and $20,000 to Judson Morhouse, Chairman of the State Republican Party, for his assistance, and indeed his guarantee that the desired license would be obtained.

In May of 1962, in the midst of the Playboy conspiracy, Harry Steinman, who was also involved in the Playboy deal, introduced Frank Jacklone to the defendant Berger. Jacklone was the prospective operator of a supper club, called the Tenement, which had been applying unsuccessfully for a liquor license. Several weeks later, the defendant, coming from Martin Epstein's hospital room, went directly to a restaurant where Jacklone met him pursuant to a previous arrangement. Berger told Jacklone that he had just spoken to Epstein and the license would cost $10,000 which would go to the Chairman. Berger would only subtract for himself money to cover his own expenses. Jacklone agreed to the deal, Berger telling him that he was handling Playboy's application and it was

"costing them a lot more." Moreover, during the trial the People introduced evidence which had been obtained through the use of eavesdropping devices placed in the office of the defendant's co-conspirator, Harry Steinman, pursuant to court order. These conversations, in which the defendant participated, conclusively corroborated, in every essential detail, the testimony of an accomplice concerning the existence and nature of the Tenement Club conspiracy. Indeed, Berger was heard counting the bribe money during the meeting at which the payoff was made.

A. The Pre-Trial Hearing Concerning the Eavesdrop Orders

In January, 1962, a Mr. Ralph Pansini came to the District Attorney's Office with a complaint against the State Liquor Authority (hereafter: S.L.A.). The complainant related that agents of the S.L.A. had entered his bar and grill and seized his books and records, an act, the complainant thought, done in reprisal for previous dealings with the Authority. For, two years before, Pansini had agreed to pay a bribe to the S.L.A. in order to obtain a liquor license, and, after receiving the license, he had reneged and refused to make payment (R. 52).* A check of the files in the District Attorney's Office had then disclosed numerous complaints against the S.L.A. charging that people seeking liquor licenses had been forced to pay bribes (R. 53). Mr. Pansini, moreover, was at this time attempting to obtain a liquor license for a store on West 45th Street, a "saturated area," where there were already many liquor stores and where, consequently, the "price" for a license would be "very high" (R. 26).

* References, unless otherwise indicated, are to pages of the record in this Court.

Equipped with a Minifon recording device, Pansini was sent to see Albert Klapper, who worked in the office of the S.L.A. Commissioner, and Harry Neyer, an attorney recommended by Klapper, and recorded conversations on March 21, 1962 (R. 24), March 28, 1962, and March 29, 1962 (R. 25). During these interviews, Klapper told Pansini about the procedures for obtaining a liquor license in New York. Klapper indicated that it was unusual for him to be talking to Pansini at all, since the deals are invariably arranged through certain attorneys, and only by consulting these attorneys can a liquor license be obtained (R. 25). When Pansini asked to be allowed to discuss the matter with Martin Epstein, the Commissioner of the S.L.A. Klapper informed him that "Mr. Epstein doesn't want to even know Mr. Pansini's name; he doesn't even want to know what he looks like or even meet him; that he must deal only through an attorney and through himself" (R. 26). Pansini was then told that the attorney he would have to see was Harry Neyer, a former employee of the S.L.A. (affidavit of April 5, 1962, R. 682) and that the price for the liquor license would be $10,000 (R. 25). During the interview with Neyer, the attorney told Pansini that he had worked with Klapper in the past, and that he is "quite well aware of the going rate to get a liquor license downtown" (R. 26).

On the basis of "evidence" submitted to Justice Sarafite (R. 56), together with affidavits (R. 681-2, R. 683), an eavesdropping order was obtained on April 13, 1962, permitting the installation of a recording device in the office of Harry Neyer, Room 1001 at 22 West 48th Street (R. 22, R. 680).

Recorded conversations which took place in the office of Neyer then revealed another conspiracy involving a bribe for a liquor license. This transaction concerned the Palladium, located at 1698 Broadway, a dance hall with a liquor license. The Palladium apparently had been raided by the police, under the auspices of the District Attorney's Office, and narcotics had been found on the premises (R. 27). Consequently, proceedings concerning the revocation of the liquor license had been instituted (R. 27). A Mr. Howard Mauro came to Neyer's office and told the lawyer that he wanted the Palladium to retain its license. Neyer responded that "it is going to be difficult; that the District Attorney's Office will be watching this particular matter and it is probably going to cost him in the area of five figures" (R. 27). Later, Neyer's side of telephone conversations pertaining to this transaction were overheard in which the lawyer remarked that "this is going to be a big one," and mentioned the price as $30,000. After one of these conversations, Neyer called back Mauro and told him that "it is really going to cost him to get that liquor license even higher than he initially told him" (R. 28). Furthermore, Neyer was visited by a Harry Steinman in connection with this transaction. Steinman agreed to pay $30,000 through Neyer to officials of the S.L.A. to secure the Palladium license (affidavit of June 11, 1962, R. 686), and, after the meeting, Steinman was followed by detectives to his office (R. 28), and then identified as a prospective liquor license applicant in his own right and nightclub owner (R. 686). It was further learned through the installation in Neyer's office, that conferences relating to the payment of these unlawful fees occur in Steinman's own office (*ibid.*).

On this information, an eavesdrop order was obtained on June 12, 1962, permitting the installation of a recording device in the office of Harry Steinman in Room 801 at 15 East 48th Street (R. 684).

From this installation, evidence of the conspiracy to bribe public officials in order to obtain a liquor license for the Playboy Club and the Tenement, subjects of the indictment against Berger, was uncovered (R. 28).

B. The Evidence

The People's Case

The Playboy conspiracy

Arnold Morton, vice-president and operational director of Playboy Clubs, International, Inc. [the parent corporation of the Playboy Club of New York], explained how the Club operates (R. 70-1). Membership, which the Club solicits by mail, is obtained by the purchase of a key (R. 71). Only key holders are admitted to the Playboy Clubs. The majority stock interest in Playboy Clubs, International, Inc. is held by Hugh M. Hefner, who also controls H. M. H. Publishing Corp., the corporation that publishes Playboy magazine (R. 72).

In the early summer of 1960, the witness met the defendant, Ralph Berger, in Morton's father's restaurant in Chicago, where Morton knew the defendant as a customer for almost twenty years (R. 72-3). On this occasion, the defendant told Morton that the Playboy Club was going to have "serious problems" in getting a liquor

license in New York (R. 73). Two or three weeks later, Morton again met Berger who told Morton he would be entertaining Chairman Martin Epstein of the New York State Liquor Authority (R. 74). Morton invited the defendant to bring Epstein to see the Chicago Playboy Club and arranged for a membership key to be made available to them (R. 74).

At their next meeting a week or two later, Berger told Morton that he didn't have time to take Epstein to the Chicago Playboy Club, but stated Epstein was "extremely upset" by the Playboy Club mailings and "method of operation" (R. 74-5). Berger also told Morton that Epstein said "it will cost $50,000 to get a liquor license to open up in New York" (R. 75). When Morton asked why, Berger only replied "it cost Gaslight $60,000 to get a license and they were still having problems because they didn't go through the right channels" (*id.*).

Morton relayed this conversation to the principals of the Playboy organization (R. 75-6) and a week later was told by Berger that he had set up a meeting with Epstein in New York (R. 76). At this meeting, Morton did nothing more than shake hands with Epstein in the lobby of the latter's office at 270 Broadway, New York City (R. 76-7). Berger then apologized to Morton for bringing him to New York just to shake hands with Epstein, and said he would set up another appointment and there would be an opportunity to talk to Epstein at a later date (R. 77-8).

Subsequently, Berger told Morton that "the man to see" in New York to file a liquor license application was Hyman Siegel, "a liquor attorney," and he, Berger, was go-

ing to New York to meet him (R. 78). Morton later had two meetings with Hyman Siegel, the first on October 29, 1960, and at both of these meetings Berger was present. Siegel was paid a $5,000 retainer on November 7, 1960 (R. 180).

Siegel recommended that Playboy establish "a not-for-profit club" in New York in order to employ the key type of operation. Playboy wanted instead the normal liquor license, designated an "RL" license, to avoid the tax problems that would accompany a not-for-profit operation (R. 79-80).

[**Hyman Amsel**, counsel to the Liquor Authority, explained that it was the position of the New York State Liquor Authority since 1960 that the ordinary liquor licensee must be open to the public at large. Only a not-for-profit club could use the requirement of club membership to exclude the general public (R. 469-71).]

Morton testified further that in December, 1960, the defendant told him that Epstein was extremely upset over the mail solicitations for memberships that Playboy was sending into New York (R. 82). Berger then set up a meeting in January, 1961, in New York among Epstein, Hugh Hefner, and Victor Lownes, another officer of Playboy (R. 82).

In February, 1961, Morton told Berger the Playboy people thought they were wasting their time with him; they could make no headway with Epstein who kept insisting the Playboy method of operation was illegal (R. 83). Morton told the defendant that Playboy would have

to "go to court" (*id.*). [In March 1961, Hyman Siegel returned his $5,000 retainer to Playboy (Preuss, R. 180-1).]

Berger, then or shortly thereafter, asked for $7500 for his services for Playboy. Morton replied that he could see no reason to pay Berger, as Playboy had already given Berger expense money, but he would discuss it with his associates. In May 1961, Playboy paid the defendant $5,000 (R. 84).

Shortly after this payment, Berger renewed his contact with Morton and told him he had the liquor Chairman "all smoothed out" and that "the number one man in New York, Judson Morhouse," wanted to see Morton (R. 86). Morton met Morhouse, head of the State Republican Party, in New York, with the defendant early in May, 1961 (R. 86-7). Before the actual meeting with Morhouse, Berger told Morton "the $50,000 deal with Commissioner Epstein is on" and that Playboy would have to "make [its] own deal" with Morhouse (R. 87-8).

At this meeting, Morton told Morhouse the problem Playboy had regarding the type of license for which it should apply, and that Epstein was "very upset" about the Playboy "method of operation" and its mailings. Morhouse told Morton, "Well, I think I can work—we can work these things out" (R. 90). Morhouse also mentioned he could conceivably appoint the next liquor Chairman as Epstein was "a very old man" and also discussed the possibility of changing some of the archaic liquor laws through legislation. Morhouse agreed that Playboy should apply for an "RL" type license (R. 90-1).

Morhouse then asked Morton for a $100,000 stock option, a $20,000 per year retainer, and requested a franchise to operate a string of gift shops within the clubs (R. 91). Morton said he would have to discuss it with the principals of his company (R. 92, R. 111).

Subsequently, Morton, accompanied by Victor Lownes, returned to visit Morhouse. Morhouse again discussed the stock option, the $20,000 per year retainer, and the gift shops. Morton and Lownes agreed to the $20,000 yearly retainer, but said they could not give Morhouse the gift shops nor the stock options (R. 94-5).

Morhouse thereafter met with Morton, Lownes, Hefner, and Preuss at the Playboy offices in Chicago where again there was discussion of the stock options, gift shops and the $20,000 yearly retainer. Morhouse specified he wanted the retainer paid by the Playboy Magazine and not the Playboy Club (R. 98-9).

After meeting with Morhouse a second time, Morton and Preuss met with Berger, who asked for the first installment of $25,000 in cash for Epstein (R. 99-100). Playboy insisted on paying by check and Berger was given two $12,500 checks, one drawn to Lee Berco Co. Inc. and the other to Harry Steinman, both payees having been designated by Berger (R. 101-3). Berger told Morton he intended to cash the two checks, pay the taxes owing on them, and deliver the balance to Chairman Epstein (R. 103).

Two weeks after Morton and Lownes met with him, Morhouse came to Chicago and conferred with the four

Playboy officers (R. 95). Morhouse was again told he could not have the stock options or gift shops, and Morhouse suggested an attorney named Jerome Marrus to file for the liquor license (R. 98-9).

In July or August, 1961, the defendant asked Morton for additional money for himself, "because the tax bite was going to be so large, there wasn't going to be anything left for his services" (R. 103-4). Morton said, "we had a deal Ralph [Berger] and you were going to get your money out of the $50,000." The defendant answered, "the Commissioner was keeping the entire amount and that the tax bite was larger than they expected and there was nothing left for himself" (R. 104).

It was thereafter agreed that the defendant would be given an additional $15,000 for his services (R. 105). During the remainder of 1961, the defendant on several occasions relayed to Morton that Commissioner Epstein was very upset at Playboy's continuing direct mailing of membership solicitations into the New York area (*id.*). In the summer of 1962, Judson Morhouse also told Morton of Epstein's annoyance at the Playboy mailings and arranged for Morton to visit Epstein in the latter's hospital room (R. 106-7).

After the district attorney's investigation into the State Liquor Authority had been mentioned in the newspapers, in late November or early December, 1962, Morhouse sent for Morton and told him he wanted it clearly understood he represented Playboy Magazine and not the Clubs (R. 108).

In December of 1962, the Playboy Club received its liquor license, but had to agree not to exclude any members of the public who did not have keys (R. 109-10).

Morton also testified that before Playboy opened in New York, it paid $775,000 for the building, encountered architectural costs of over $300,000 (R. 81) and eventually spent approximately $3,800,000 on the building. Also, before the building opened, Playboy had obtained $1,500,000 of the public's money from the advance sale of keys through its mail solicitations (R. 463).

Morton further testified that he believed unless Playboy paid as demanded, they would lose their investment in New York. He also felt they were forced to make the payments. Morton did not think he conspired to bribe a public official; he and his colleagues felt they were the victims of corruption (R. 461-6).

However, Arnold Morton also testified that no one ever threatened him that unless there was a payoff, Playboy would not get its license (R. 467). He explained that his definition of bribery was "to pay for something you are not entitled to" (R. 468). But he affirmed that he had truly testified before the grand jury that he appreciated that "the whole thing was illegal and a conspiracy to pay off a public officer" (R. 457).

Robert Preuss testified he was Vice-President in charge of finance and the business manager of the Playboy Clubs and Playboy Magazine (R. 114). He first met the defendant when Morton brought him into his office early in May,

1961, to discuss reimbursement for his expenses in travelling to New York on behalf of Playboy (R. 118-19). When Preuss questioned giving Berger any more than the $5,000 already paid, the defendant replied that, while that sum was for his services, he had also spent other money for which he wanted reimbursement (R. 119). Berger asked for a figure in excess of $5,000, but Preuss told him to submit a bill "outlining" his expenses to amount to approximately, but not exactly, $1,500, and Playboy would pay the bill (R. 120).

At this same meeting, the defendant told Preuss he had brought Morton to see Morhouse who would guarantee that Playboy got its liquor license (R. 134). When Morton had reported back to Hefner, Lownes and Preuss, and told them that Morhouse wanted $20,000 yearly for five years, Preuss asked, "On top of Epstein?" Morton answered, "yes." Preuss also testified that when Morton related his conversation with Morhouse, Hefner inquired "how high up does this go?" Victor Lownes interjected, "I think we ought to blow the whistle on this whole affair," to which Hefner countered, "but who do we go to?" (R. 135-6). Morton asked Lownes to go back with him to see Morhouse and verify what he had said (R. 137).

After the second trip to Morhouse, Morton told Preuss that the defendant said it was time to pay Epstein part of his money (R. 138). On June 27th, 1961, Preuss delivered to Berger two checks for $12,500, as the defendant had asked that the $25,000 be split and paid to different parties to help him in his tax situation (R. 126, R. 129-30). Berger gave Preuss a voucher for the one check

payable to Lee Berco Co., Inc. and promised to mail the other voucher on the letterhead of Harry Steinman, the other payee, later. The defendant told Preuss he would run the checks through the bank accounts of the payees, pay the tax, and the remainder would be paid to Epstein (R. 128-30).

Morhouse met with the Playboy officers in Chicago in late June or early July where again the subject of the stock options was discussed. But when Preuss said it would be necessary to publish any stock options given to Morhouse in a public prospectus, Morhouse said, "Well, we can't have that" (R. 139-40). Morhouse also directed that his retainer be paid by Playboy Magazine and not Playboy Club (*id.*). On July 17, 1961, Morhouse then sent a bill for his first $20,000 retainer to Playboy Magazine (R. 140-1). Playboy sent him an installment of $10,000 by a Playboy Club check which Morhouse returned, asking again that he be paid by the magazine, which was done on August 22, 1961 (R. 142-4).

In early August of 1961, Berger came to Preuss, accompanied by Morton, and told Preuss that Epstein had told him that "this was a much more difficult case than he had first anticipated and that he was retaining the entire proceeds," that is, the entire $50,000. The defendant said he would have to obtain his share of the $50,000 directly from Playboy (R. 145). Preuss told the defendant on August 17, 1961, that Playboy would pay him an additional $15,000, with $5,000 to be paid shortly and the remainder later (R. 146).

On January 31, 1962, Preuss testified that the defendant came to him and said Epstein was very ill and needed additional funds and it was time to discuss payment of the remaining unpaid balances on Epstein's $50,000 and the defendant's $15,000 (R. 161-2). Berger and Preuss then worked out a schedule of payments (R. 162-3). This money was eventually paid to the defendant with the exception of $9,000 for Epstein (R. 178-9).

In February, 1962, Morhouse called Preuss for payment of the balance of his $20,000 and told Preuss to keep $2,000 to pay Marrus. Preuss sent the remaining $8,000 to Lyman Associates, Inc. (R. 175-7), charging all the checks given to Berger or Morhouse to legal or promotional expenses (R. 181).

Victor Lownes testified that during the period of the conspiracy he was Vice-President and Promotional Director of Playboy Clubs International, and the company that published Playboy Magazine (R. 189). In January, 1961, he and Hugh Hefner conferred with Chairman Epstein in New York regarding the Playboy license (R. 191-2).

At this meeting, Lownes told Epstein that Playboy had won an Illinois court case upholding their right to demand a one-time admission charge for the purchase of a key without regard for the purchaser's "race, creed or color". Nevertheless, Epstein insisted they operate as a "not-for-profit" club in New York and "we were going to operate his way or not at all" (R. 192-3). Epstein also mentioned that the Gaslight Club was following his recommenda-

tion and shifting over to a not-for-profit private club method of operation. Hyman Siegel, who was present at this conference as the attorney for Playboy, thereupon commented he was willing to bet that the Gaslight Club would now get their license (R. 193-4).

After this meeting with Epstein, Lownes recommended that Playboy "forget all about trying to make any kind of deal with Epstein through Berger," apply for a license in the regular way and then "fight the thing through the courts" as had been done in Illinois (R. 195-6).

Lownes corroborated Morton's testimony on the second meeting with Morhouse, and the testimony of Preuss regarding the conference among the Playboy officers that followed Morton's first meeting with Morhouse. He further corroborated the testimony of Morton and Preuss concerning the meeting with Morhouse in Chicago (R. 197-202).

George Kelly, counsel to the Michigan Avenue National Bank of Chicago, testified that the Lee Berco Co., Inc., bank account was carried at this bank, that Ralph Berger was the only person authorized to draw on that account, and that the various Playboy checks payable to Lee Berco Co., Inc. cleared through this bank account (R. 253-9).

The Tenement conspiracy

Frank Jacklone testified he was the owner of a supper club known as "The Tenement" which had a liquor license (R. 208). Jacklone stated he had encountered difficulty in obtaining the liquor license for his club, and had been forced

to withdraw his first application (R. 209-10). His second application was encountering further delay despite the payment of $10,000 to Martin Epstein's brother-in-law, Nat Roth, who, together with another attorney, was handling the defendant's second license application (R. 210, R. 218-19).

In May, 1962, Jacklone sought the assistance of Harry Steinman (R. 210, R. 236-7) who put him in touch with Berger by telephone (R. 212). He received assurances from the defendant (R. 214).

Jacklone first met the defendant personally on June 25, 1962, at Kenny's Steak Pub in Manhattan, where Berger was introduced to him by Harry Steinman (R. 218-19). Berger told Jacklone he had just spoken to "Mr. Epstein" and that Jacklone would have no trouble obtaining his license; but it would cost $10,000 (R. 214). Jacklone was told by the defendant that this sum of money was going entirely to Epstein except for the defendant's expenses (R. 216-17), and the defendant added that "he was handling Playboy and it was costing them a lot more than I [Jacklone] was paying" (R. 244). Jacklone agreed to deliver the $10,000 to the defendant on the day he received his license (R. 218).

Steinman thereafter introduced Jacklone to an attorney named Harry Neyer, who was to "follow" Jacklone's license application then pending before the State Liquor Authority (R. 221-2). Steinman was also given a $2,500 prepayment on the $10,000 to hold for Jacklone in advance of obtaining the license (R. 236).

On June 28, 1962, Steinman notified Jacklone that his application had been approved; Jacklone received it that day (R. 222-3). But Jacklone was unable to deliver the balance of the money that day as he had agreed, and when he called Steinman to tell him this, the defendant got on the phone and said "after you have your license, maybe you think you are set; but you could also lose it the same way you got it" (R. 224).

On the morning of June 29, 1962, Jacklone delivered the balance of $7,500 to the defendant in Steinman's office with Steinman present. The money was handed over to Berger, who counted it in Jacklone's presence (R. 225-6); some small talk followed before Jacklone left (R. 227-8).

Detective **Anthony J. Bernhard** testified that on June 25, 1962, he observed the defendant entering the hospital room of Martin Epstein, leave a short while thereafter and go to Kenny's Steak Pub where he met Frank Jacklone. There the defendant was overheard saying to Jacklone, "don't worry, everything will be all right, I just spoke to him" (R. 242-3).

Detective **James Poulos** testified that on June 27, 1962, he observed Berger enter Martin Epstein's hospital room, remain a short while and leave (R. 249-50). On June 29, 1962, at approximately 2:30 p.m., he also watched the defendant again entering Epstein's hospital room, remaining inside until a nurse left, and then looking up and down the corridor before going back into the room with Epstein. At 3:37 p.m. the defendant left the hospital room (R. 251-2).

Detective **Walter Finley** testified he saw the defendant enter a phone booth in the lobby of the New York Hospital at about 6 p.m. on June 27, 1962 and overheard a portion of the conversation where the defendant said: "You had better get in touch with Harry, he called down there at a quarter to five and the approval was in" (R. 247-8). On June 29, 1962, Detective Finley took motion pictures of the defendant exiting from New York Hospital (*id.*; Exh. 46).

Detective **Boleslaw Baransky** testified that on June 16, 1962, pursuant to a court order, he installed a microphone in Room 801 at 15 East 48th Street, the office of Harry Steinman (R. 294-5, R. 309). The microphone was concealed on the wall, about ten inches below the edge of a desk, and a cover was placed over it (R. 309-10). Sounds in the room were transmitted over wires leading from the microphone to a tape recorder located in the basement of a nearby building (R. 295, R. 313-14).

Detective **William Reilly** testified that on June 28, 1962, he listened to and recorded, by means of an electronic eavesdropping device, a conversation emanating from the office of Harry Steinman in which Steinman and the defendant participated (R. 286, R. 329). He also recounted his independent recollection of the conversations he overheard (R. 287, R. 297, R. 293). There were no erasures by accident while he was supervising the actual original recording (R. 346-7). When he subsequently replayed the tape, in preparing a transcript of the conversations thereon, he made no erasures, deletions or additions (R. 439-40). The transcript (Exh. 63) of the tape that he pre-

pared with the assistance of two other detectives was a true and accurate transcript of the conversation he recorded on June 28th (R. 390-1), and Detective Reilly was able to identify the voices on the tape (R. 282, R. 287). [June 28th was the date Jacklone was to have delivered the balance of the $7,500 bribe to the defendant but failed to do so.] On the tape (Exh. 61A) the defendant complained at length to Steinman that the money had not been delivered as promised and he (Berger) had an appointment at the hospital.

Detective **Sidney Berkowitz** testified that on June 29, 1962, he overheard and recorded by means of an electronic eavesdropping device, conversations emanating from Harry Steinman's office in which the defendant, Steinman, and Jacklone participated (R. 347-8). He also testified as to how he was able to identify the voices on the tape (R. 348-9, R. 354, R. 358-9). He never made any additions, deletions or erasures on the tape of June 29th (R. 446-7). Detective Berkowitz also prepared a transcript (Exh. 62) of the conversation on the tape which was a true and accurate transcript of the conversation recorded on the tape (R. 359-60). Under cross-examination, Detective Berkowitz carefully explained the mechanics of preparing the transcript and how he differentiated in the transcript between pauses and inaudible portions (R. 360-90). On the recording (Exh. 61A), Frank Jacklone is heard to deliver the $7,500 to the defendant who then counts it. Steinman is heard to tell Jacklone to make out a check to Harry Neyer for $250.

Frank Jacklone, recalled, testified that he had listened to this tape recording of June 29th (Exh. 61A), compared

it with the transcript of his recorded conversation (Exh. 63) and that both the tape and the transcript were true and accurate reproductions of that conversation (R. 449-50).

Detective **Henry Cronin** testified that on December 10, 1962, the District Attorney of New York County instituted reciprocal witness proceedings in Cook County, Illinois, pursuant to Section 618-(a) of the Code of Criminal Procedure, to obtain the defendant's testimony before a New York County Grand Jury (R. 275-6). [The defendant never testified before the grand jury (R. 298-9)]. On December 10, 1962, Berger was served with process directing his appearance before the Criminal Court of Cook County (R. 275-7). The defendant then accompanied the police officers to the Chicago Criminal Courts Building (R. 268-9) and while standing in a corridor of that building awaiting his attorney, Berger was observed surreptitiously tearing up two cards and discarding them in two separate locations. One card bore the name and phone number of Harry Neyer and the other the name and phone number of Martin Epstein, Chairman of the New York State Liquor Authority (R. 268-70; Exhs. 56, 57).

Summary of Argument

An electronic search for oral evidence is a search within the cognizance of the Fourth Amendment. While the right of the people to be secure against unreasonable intrusions of the state should include assurance against any electronic penetration into a constitutionally protected area, the right is subject to suspension on a court-issued order, founded upon probable cause to believe evidence of crime will be discovered by the search. Although spoken words are of "evidentiary value only," they are not immune to seizure on that account. The so-called "mere evidence rule," ill-founded on a medieval superstition refined into a property doctrine of escheat and generally in judicial and scholarly disrepute, must be stricken from the law of evidence.

The constitutional mandate for particularity in the description of incriminating matter to be sought can be met adequately in the case of intangible evidence. A warrant such as that in the instant case, which identifies the object of the search by reference to the criminal activity to which it pertains conforms to standards of particularity established in conventional search and seizure decisions. Nor is a search for speech necessarily indiscriminate or general because the hunters perceive innocuous conversations in the pursuit of their object. Broad perception characterizes all searches, which are only limited spatially by the Constitution. This implicit approval of deep probes into private and innocent property, by compelling analogy, tolerates as well overhearing irrelevant conversations. The Fourth

Amendment's companion requirement of particularity in the designation of the "thing" to be seized can also be applied, albeit somewhat less readily, to the acquisition of intangibles. The guiding principles of the Constitution should be interpreted to govern the more sophisticated techniques of modern technology where interpretation does no violence to their essential import. Application requires definition of the nature of a seizure of words. Plainly, neither hearing nor recording speech constitutes a seizure, as neither viewing nor photographing tangibles is regarded as seizing them. Rather the seizure of oral evidence occurs when some use is made of what is perceived, either as evidence or as leads to other evidence. And a particular prior description of the speech of which such use may be made is altogether possible, and indeed was given in the case at bar.

The lawful process of secretly acquiring criminal speech does not operate as a curtailment of free expression in derogation of the First Amendment. Nor does public anxiety concerning wide use of electronic devices justify abolition of the court-regulated search. Realistically, it is unfair to project a "hagridden" populace, fearful of expression and insecure in their private lives, as a result of the limited use of electronic surveillance in aid of law enforcement.

Underlying the ardent condemnation of eavesdropping voiced in many quarters is an essentially emotional repugnance for the technique. Distasteful as the unseen ear of government may be, resort to such surreptitious discovery of crime differs neither in kind nor degree from

other methods for obtaining evidence. Surely, no just comparison may be drawn to the outrageous and brutal means of recovering evidence which have been condemned, *ad hoc*, as violations of Fourteenth Amendment Due Process. In weighing the constitutional significance of the sensation of abhorrence, the facts of life in law enforcement should not be shunned. And the fact is that necessary evidence revealing criminal activity and the guilt of criminals usually lies buried behind someone's curtilage of preferred privacy. In demanding the production of evidence for the prosecution of crimes, society commands its agents to probe through this curtain by reasonable and supervised procedures. The sacrifices of privacy and anonymity demanded of all citizens, witnesses and suspects alike, in this cause are an unavoidable price of living in a more secure community.

The urgent necessity to resort to extraordinary methods is demonstrated by the present case. In investigations of this type, the community seeks to purge a pervasive menace which corrodes the integrity of government itself. The corruption of powerful agencies of the state is at once a grave threat and a peculiarly inaccessible crime. Like the underworld activity which it invariably strengthens, the crime is often between conspirators none of whom can be expected to come forward with the testimony to convict the others. And in jurisdictions such as New York, where no conviction can be had on the uncorroborated testimony of an accomplice, independent proof makes the prima facie case. The hard-shelled resistance of organized criminal activity to conventional techniques of law enforcement has been well documented, along with the depth and extent of

the penetration of this stain into the very fabric of our society. Abolition of warranted electronic quests for evidence would indisputably deprive society of its most effective tool to combat those who undermine the high ideals of a free society. Beyond these cases, which are the bulk of the eavesdrop's work, there are other crimes of grave consequences where stubborn barriers to proof will yield only to extraordinary devices. Inherently limited by manpower costs and judicial discretion, employment of electronics is no less justified in the pursuit of crimes of this nature.

Probable cause supports the order by which the eavesdrop evidence was obtained in the case at bar. The evidence adduced at trial was acquired in a surveillance of the office of Harry Steinman and included conversations in which the petitioner participated. The affidavit submitted to obtain this order spelled out clearly and completely the grounds for the reasonable belief that words would be spoken in that location by and between conspirators in a scheme to bribe the State Liquor Authority. Among the facts alluded to in the affidavit in question, was information learned in a prior existing surveillance of the office of Harry Neyer. Despite some cloudiness in the record pertaining to the manifest basis for the Neyer order, no present challenge to that order lies. For it is clear that the instant petitioner, who was not present in Neyer's office and had no interest in the premises, lacks standing to controvert the legality of that search. The subsequent utilization of the "fruits" of the Neyer installation in the Steinman application does not imbue the petitioner with a derivative status. For, as cases of conventional search demonstrate, even were the Neyer search unlawful, its product could be lawfully used against one whose rights were not trammelled by the initial illegality.

POINT I

Court ordered eavesdropping, pursuant to Section 813-a of the New York Code of Criminal Procedure, is not proscribed by the United States Constitution [answering petitioner's Points I, III and IV, pp. 15-64, 74-81].

Introduction

At the trial of Ralph Berger for his participation in a scheme to bribe a state official, essential evidence to corroborate accomplice testimony [N. Y. Code Crim. Proc., §399] was adduced by the introduction of recorded conversations between the defendant and two co-conspirators. This evidence was obtained by means of a hidden microphone, secretly installed in the business office of Harry Steinman (one of the conspirators) pursuant to an ex parte order issued by a justice of the New York Supreme Court on the authority of Section 813-a of the New York Code of Criminal Procedure. Challenging the use of this evidence, the petitioner puts in issue the order, the statute, and indeed, the constitutionality of all electronic surveillance in the investigation and prosecution of crime. In a separate point, petitioner attempts to insert the issue of audibility of the tapes, illicitly circumventing the denial of certiorari on that question (brief, Pt. III). He argues that the quality of the tapes was poor, and that it therefore reflects detrimentally upon the whole process of eavesdropping. Suffice it to say, that the tapes were sufficiently audible to pass the scrutiny of a hearing by the court (R. 475-91), and thereafter convince a jury. Moreover, even assuming a malfunction of one machine used, the smuggled

point finds no place in this case [*Irvine* v. *California*, 347 U. S. 128, 129-130 (1954)]. Petitioner's challenge to eavesdropping is not that it may sometimes fail, but that it works too well.

The several means by which law enforcement obtains the hidden evidence necessary to judge those who threaten the social order are, of course, subject themselves to the judgment of the Constitution. The broad, clear tones of that 18th Century language enunciate standards for official restraint which serve adequately to govern 20th Century techniques of evidence gathering. And viewed through the constitutional frame, electronic eavesdropping is fully defined as an advanced form of search and seizure, quite susceptible to regulation under the precepts of the Fourth Amendment. Electronic devices have been attacked on various grounds, and deemed by some to be inherently beyond the control of the Fourth Amendment. Analysis reveals, however, that other attacks fail and that the analogy between the acquisition of tangible and oral evidence, although not perfect, is so strong in essential particulars that if the strictures of the Fourth Amendment are observed, the Constitution is not offended by law enforcement's resort to this vital contemporary tool for unearthing essential proof otherwise inaccessible.

A brief history

Electronic eavesdropping is, needless to say, peculiarly a product of the scientific enlightenment. At common law, the problem was rather simple. "Eaves-droppers, or such as listen under walls and windows or eaves of a house, to hearken after discourse, and thereupon to frame

slanderous and mischievous tales, are a common nuisance" [IV BLACKSTONE §168]. But the development of new carriers of communications concomitantly gave birth to schemes to intercept the messages. Interception of telegraph transmissions became widespread in the middle and late 19th Century, leading to laws protecting the property of the telegraph companies, although not the privacy of the users [LANDYNSKI, SEARCH AND SEIZURES AND THE SUPREME COURT 199 (1966); Rosenzweig, *The Law of Wire Tapping,* 33 CORNELL L. Q. 73 (1947)]. When the telephone was used by news agencies to carry dispatches, competing newspapers began stealing their rival's messages, leading to the prohibition of such practices by Illinois in 1895 and California in 1905 [LANDYNSKI, *op. cit. supra,* at 199; DASH, KNOWLTON & SCHWARTZ, THE EAVESDROPPERS 25-26 (1959)]. And government was not slow to perceive the utility of new methods, the first use of electronic interception for criminal prosecution having occurred in New York City in 1895, during a police investigation of a charity frauds case [LANDYNSKI, *op. cit. supra,* at 199].

In 1918, with the entry of the United States into the First World War, Congress abolished all wiretapping [40 Stat. 1017] as an internal security measure, since the telephone system came under government control for the duration of the war. At the end of the conflict, and with the return of the telephones to private ownership, the legislation lapsed [Note, *Wiretapping and the Congress,* 52 MICH. L. REV. 430, 436 (1954)], and the United States, in turn, employed electronic interception, particularly to enforce the prohibition of the Eighteenth Amendment [LANDYNSKI, *op. cit. supra,* at 199-200]. Such investigations

eventually led to the smashing of a huge bootlegging ring and the arrest of Roy Olmstead.

In 1928, the case reached the Supreme Court [*Olmstead* v. *United States,* 277 U. S. 438], where the telephone interception was sustained. The Court, observing that the message was intended to be projected beyond the premises, held that there was no physical invasion of the room, and the Fourth Amendment applied only to the seizure of tangible objects, a class held not to include the spoken word. During the Second World War the major principles of *Olmstead* were applied to non-telephonic eavesdropping in *Goldman* v. *United States* [316 U. S. 129 (1942)], although *Goldman* departed from *Olmstead* to the extent of viewing the intent to project the voice outside the room as a distinction "too nice for practical application" [316 U. S. at p. 135].

The *Goldman-Silverman* distinction

Of two buttresses supporting *Goldman,* one has since been toppled. *Silverman* v. *United States* [365 U. S. 505 (1961)] brought overheard oral evidence within the ambit of the Fourth Amendment, expanding "persons, papers and effects" to include intangibles [also see, *Wong Sun* v. *United States,* 371 U. S. 471 (1963); *Lanza* v. *New York,* 370 U. S. 139, 142 (1962); *Irvine* v. *California,* 347 U. S. 128 (1954)]. However, *Silverman* declined to overturn the doctrine of *Olmstead,* perpetuated in *Goldman,* that only an actual physical trespass invalidates an interception. In *Goldman* a search by external detectaphone, placed against a party wall, was upheld. In *Silverman* a search by a spike microphone inserted into a party wall

was struck down. Later, *Clinton* v. *Virginia* [377 U. S. 158 (1964)] taught that the demarcation must be expressed in terms seemingly borrowed from a topic even more remote than real property: any penetration, however slight, is sufficient. Petitioner's amicus, the New York Civil Liberties Union, urges that the physical penetration test should be abandoned, and *Goldman* overruled. We agree.

It is fully time for the Court to complete the work that *Silverman* began. The curious reluctance of the *Silverman* majority to overturn *Goldman* perpetuates a legal eccentricity. As this Court rightly noted eighty-one years ago, the official malfeasance outlawed by the Fourth Amendment is not merely a trespass against a property right:

> "It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" [*Boyd* v. *United States,* 116 U. S. 616, 630 (1886)].

Indeed, the false emphasis on property concepts was ridiculed in the majority opinion of Justice STEWART in *Silverman* itself [365 U. S. at 511-12].

Recognizing the right to security from unreasonable searches as the vital value, the physical trespass standard of *Goldman* and *Silverman* simply will not do. For ripening technology has created the electronic beam which searches without physical intrusion.* Thus, science ren-

* On devices, such as the parabolic microphone; which can overhear conversations without being placed within a premises, see, e.g., Westin, *Science, Privacy and Freedom,* 66 COLUM. L. REV. 1003, 1005-10 (1966); DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS 305-79 (1959); *Silverman* v. *United States,* 365 U. S. at 508-9.

ders barring the door to the King's men an ineffective way of keeping them out. Surely, then, no logic commends a doctrine of exempting more sophisticated penetration from the control of the Fourth Amendment requirements of probable cause and judicial supervision. These safeguards against abuse are as appropriate to the electronic wave as to the thumbtack crudely affixed to the outside of the wall [see, *Clinton* v. *Virginia*, 377 U. S. 158, *supra*]. As the Fourth Amendment can govern the acquisition of intangible evidence, so it can regulate invisible means of searching for it.

Several eminent Justices of this Court have powerfully argued that the *Silverman-Goldman* distinction does not satisfactorily define the scope of the constitutional protection [see, opinion of Justice BRANDEIS dissenting in *Olmstead*, 277 U. S. at 478; Justice MURPHY dissenting in *Goldman*, 316 U. S. at 136; Justice BRENNAN dissenting in *Lopez* v. *United States*, 373 U. S. 427, 446 (1963); Justice DOUGLAS concurring in *Silverman*, 365 U. S. at 512], and many legal commentators concur [e.g., King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240 (1964); Semerjian, *Proposals on Wiretapping in Light of Recent Senate Hearings*, 45 B. U. L. REV. 216 (1965)].

Shaking free of the trespass concept, the Court in majority opinions has already indicated a return to a useful idea articulated in *Olmstead* in a different context [277 U. S. at 466]. In a group of recent cases [*Hoffa* v. *United States*, 385 U. S. 293 (1966); *Osborn* v. *United States*, 385 U. S. 323 (1966); *Lewis* v. *United States*, 385 U. S. 206

(1966); also see, *Lopez* v. *United States,* 373 U. S. 427, 439, *supra*], the Court noted the risk taken by the speaker that his words would be reported. This approach is not without merit and is more in harmony with traditional search and seizure principles, and indeed has been advocated in legal journals [e.g., 75 HARV. L. REV. 40, 186 (1961)].

The barrier of privacy; a suggested delineation

Clearly, if real property concepts be rejected, a substitute for physical boundaries must be enunciated to define the enclosure of the secure area of privacy protected by the Fourth Amendment. The guideposts are already visible in the "risk" and "intent" theories which have emerged from the cases discussed above, read in conjunction with opinions describing the "constitutionally protected area" [see, *Lanza* v. *New York,* 370 U. S. 139, 143 (1962)]. These are realistic notions which comport with common understanding. Words spoken or actions taken in protected places, under circumstances where no extraneous human receptor may be reasonably expected to perceive them, are intended to be private. And such reasonably grounded expectation should be protected against intrusion by electronic beams as well as sensors installed by physical penetration. Accordingly, those who act or speak in homes or offices, behind closed doors and drawn blinds, should be confident that no unseen intruder may invade their sanctum by any means, without the specific license of a court order. On the other hand, acts done in the open, or in a constitutionally protected area tacitly open to inspection from inside or outside are traditionally subject to police observation, precautions to insure privacy not having been

taken [see, *Hester* v. *United States,* 265 U. S. 58 (1924) (open field); *Fisher* v. *United States,* 205 F.2d 703 (D. C. Cir. 1953) (business premises open to public); *Ellison* v. *United States,* 206 F.2d 476 (D. C. Cir. 1953) (open door of private home); *People* v. *Martin,* 45 Cal. 2d 755, 290 P.2d 855 (1955); *People* v. *Andrews,* 314 P.2d 175, 177 (Calif., 1957); *Crowell* v. *State,* 147 Tex. Crim. 299, 180 S.W. 2d 343 (1944) (uncurtained windows); *MacDonald* v. *United States,* 335 U. S. 451, 458 (1948) (open transom); *People* v. *Ruiz,* 146 Cal. App. 630, 304 P.2d 175 (1956) (existing peephole)]. Also, protection varies with the sense by which the conduct is perceived. Actions behind a thin, opaque partition, for example, are immune from observation, but words loudly spoken there are subject to aural reception. Conversely, words uttered behind a closed, uncurtained window should not be artificially overheard, but actions are subject to visual perception. Such enforcement of natural belief in one's personal security is fully consistent with the language and intent of the Fourth Amendment protection against unreasonable searches.

Electronic penetration of the protected area must be differentiated from amplification by mechanical or electronic device. Recording by film or on tape what the unaided eye or ear perceives is unobjectionable, but when does the use of aids to perception become a penetration requiring judicial supervision? Lights and lenses to amplify sight have been approved in various jurisdictions against a claim of unreasonable search [*United States* v. *Lee,* 274 U. S. 559, 563 (1927) (a searchlight, fieldglass); *Haerr* v. *United States,* 240 F.2d 533 (5th Cir. 1957); *Childers* v. *Commonwealth,* 286 S.W. 2d 369 (Ky. 1955) (flashlights); *Hodges* v. *United*

States, 248 F.2d 281 (5th Cir. 1957) (binoculars)]. By application of the same reasoning, the use of amplifying devices to aid the perception of speech which could be normally heard, although less distinctly, should not be regarded as a penetration into a constitutionally protected area. The sound waves projected beyond the confines of protection by the speaker are subject to capture with electronic assistance. But where the instrument is of such a nature that it renders audible sounds which are below the threshold of human perception, then, in all reason, the device must be said to penetrate the confines of privacy in a search for speech. And such a search by electronic penetration should require a court's warrant.

But even under realistically reformulated and expanded concepts of constitutional security, obstacles remain before eavesdropping can be brought safely within the Fourth Amendment's prescription for a reasonable search and seizure. For obviously the reconstructed barrier of privacy we advocate, sturdy though it be, does not place communications totally outside the reach of the prosecution's hunt for evidence.

> "The requirements of the Fourth Amendment are not inflexible or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' * * * could be made a precondition of a lawful electronic surveillance" [*Osborn* v. *United States,* 385 U. S. 323, 330, *supra,* quoting *Lopez* v. *United States,* 373 U. S. at 464, dis. opin. of Justice BRENNAN; to the same effect see, *Silverman* v. *United States,* 365 U. S. at 513, opin. of Justice DOUGLAS; *Goldman* v. *United States,*

316 U. S. at 140, n. 6, opin. of Justice MURPHY; *Lopez* v. *United States,* 373 U. S. at 441, opin. of Chief Justice WARREN].

Like tangible objects, oral evidence, in our view, is fit for the permissive as well as the restrictive sanctions of the Fourth Amendment. The obstacles to realization of this position have been vigorously argued by petitioner and his amici, who contend that the evidence sought is "mere evidence" and not open to seizure, that an eavesdropping warrant cannot particularize the thing to be seized, that the search and seizure are both inherently indiscriminate and general, and that the First Amendment and "the right to privacy" are violated by electronic searches. A sense of moral repugnance to electronic intrusion infuses the argument throughout.

The "mere evidence" argument

Petitioner argues that it is "impossible" to devise a constitutionally sound warrant, since eavesdropping involves a proscribed search for and seizure of "mere evidence." "Mere" evidence has been defined as any evidence which is not a means or instrumentality by which a crime is committed, nor fruits of a crime, nor contraband, nor a weapon [*United States* v. *Lefkowitz,* 285 U. S. 452 (1932)]. The notion that mere evidence is immune to lawful seizure is derived from *Gouled* v. *United States* [255 U. S. 298 (1921)], an unfortunate opinion, which defies all attempts at satisfactory rationalization, and which consequently has been the target of devastating scholarly attack from its inception until the present day [e.g., Comment, 31 YALE L. J. 518, 522 (1922); 8 Wigmore Evid.

§§2251, 2264 (3d ed. 1940); Note, *Limitations on Seizure of Evidentiary Objects: A Rule in Search of a Reason,* 20 U. CHIC. L. REV. 319 (1953); Comment, *Eavesdropping Orders and the Fourth Amendment,* 66 COLUM. L. REV. 355 (1966); Kaplan, *Search and Seizure: A No-man's Land in the Criminal Law,* 49 CALIF. L. REV. 474 (1961)]. With the application of the Fourth Amendment to the states, state courts have leveled equally ravaging assaults upon it [e.g., *People* v. *Thayer,* 47 Cal. Rep. 780, 408 P.2d 108 (1965); *State* v. *Bisaccia,* 45 N. J. 504, 213 A.2d 185 (1965); *People* v. *Grossman,* 27 App. Div. 2d 572 (2d Dept. 1966), reversing, 45 Misc. 2d 557 (S. Ct. Kings Co. 1965)]. All of these, no doubt, have contributed to the pending reconsideration of the rule by this Court [*Warden* v. *Hayden,* Oct. Term, 1966, No. 480, cert. granted, 385 U. S. 926 (1966)].

Gouled involved a seizure without a warrant of a bill for legal services and two contracts, one executed and one unexecuted. The documents were taken by an army intelligence agent in an investigation of alleged use of mails to defraud the government. The Court declared that the unwarranted seizure violated the Fourth Amendment, and added that its use in evidence violated the Fifth Amendment's self-incrimination protections. The Court noted, however, that even a search warrant for the seizure of papers "of evidential value only" violated the Fourth Amendment.

The language of the Fourth Amendment gives no support for the rule. The Amendment states that all "persons, houses, papers, and effects" are secure against "un-

reasonable searches and seizures." No special protection can be read into these words for papers or effects of evidentiary value only. On the contrary, as Chief Justice WEINTRAUB observed:

> "The Fourth Amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable and the Fourth Amendment's formal requirements, if applicable, are met" [*State* v. *Bisaccia,* 45 N. J. 504, 213 A.2d 185, 193, *supra*].

Nor does the historical background of the Fourth Amendment demonstrate that the mere evidence rule is somehow subsumed in its protections. Indeed, in the well preserved record of the drafting of this Amendment, no word occurs suggesting that a distinction of type was intended in the material subject to search and seizure by warrant. The principal concern was rather with the necessity for specifically directed and limited warrants and the grounds for their issuance [see, generally, LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 22-105 (1934); LANDYNSKI, *op. cit. supra,* pp. 19-40 (1966); and this Court's comprehensive discussions in *Stanford* v. *Texas,* 379 U. S. 476, 481-5 (1965); *Marcus* v. *Search Warrants,* 367 U. S. 717, 724-9 (1961); *Frank* v. *Maryland,* 359 U. S. 360, 363-6 (1959)]. To impute so irrelevant a purpose to the framers as the exclusion of mere evidence from the warrant clause does gross injustice to history [see *State* v. *Bisaccia,* 213 A.2d 185, *supra*; *People* v. *Thayer,* 408 P.2d 108, *supra*].

The apologists for the mere evidence rule turn to the Fifth Amendment for support, arguing, in effect, that mere

evidence is more incriminating than other evidence. Basing their decision on *Boyd* v. *United States* [116 U. S. 616 (1886)], the *Gouled* Court apparently believed that the acquisition of mere evidence under the Fourth Amendment contravened the Fifth Amendment. And *Boyd* did speak of the interplay between the Fourth and Fifth Amendments. The Court reasoned that the Fifth Amendment, forbidding the extraction by compulsion of self-incriminatory evidence from anyone, illuminated the nature of an unreasonable search under the Fourth. This injection of the Fifth Amendment into the rationale of the mere evidence rule does little to sustain its virtue. For one thing, it introduces a baffling and unnecessary contradiction within the Bill of Rights. Again, according to Chief Justice WEINTRAUB:

> "It is not apparent how the Fifth Amendment can make illegal a search and seizure which the Fourth Amendment permits. The Fourth has its own expressed limitations upon search and seizures; there is no reason to suppose the framers of the Amendments intended to imply through the Fifth an additional limitation upon the Fourth" [*State* v. *Bisaccia*, 45 N. J. 504, 213 A.2d at 188].

Furthermore, while the Fifth Amendment properly lent support to *Boyd*, the same principle can not be pressed to the service of *Gouled* or the mere evidence rule it engendered. The Fifth Amendment does not bar simply self-incrimination; it prohibits compulsory self-incrimination [*Schmerber* v. *California*, 384 U. S. 757 (1966); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *United States* v. *White*, 322 U. S. 694, 698-9 (1944)]. In a case such as *Boyd*, where a subpoena compelled the accused to produce testimonial

records on his own initiative, a Fifth Amendment claim is properly presented. For, besides compelling production of the articles sought, response to a subpoena requires authentication of the incriminating evidence [see, *Curcio* v. *United States,* 354 U. S. 118, 125 (1957); *United States* v. *White,* 322 U. S. 694, *supra*; *People* v. *Thayer,* 408 P.2d at 110, *supra*]. In a real sense, therefore, Boyd's compelled response inculpated him. But the situation is quite different with a search warrant. The accused is not required to do anything aside perhaps from opening a door, and he does not have to characterize as genuine what is taken. The warrant authorizes only the state to act, and draw its own conclusions from what it finds.

In addition, any compulsion inherent in the entry to execute a search warrant for tangible objects is completely absent in the present case. For the person under surveillance was not even induced, much less compelled, to incriminate himself. As was held in *Hoffa* v. *United States* [385 U. S. 293, 304 (1966)]:

> "In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversation with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case."

The mere evidence rule, far from a natural corollary to the Fifth Amendment, is actually antagonistic to the privilege against self-incrimination. Where the privilege shields most jealously, the rule is inoperative: evidence

seized from the person rather than from the premises is exempt from the rule's proscription [*United States* v. *Kirschenblatt,* 16 F.2d 202 (2d Cir. 1926); *United States* v. *Kraus,* 270 F. 578 (S. D. N. Y. 1921); also see, *Abel* v. *United States,* 362 U. S. 217 (1960)]. These authorities would seem to teach, at the same time, that oral evidence, necessarily obtained "from the person," would be immune to attack on grounds that it was mere evidence. In sum, it is overwhelmingly demonstrable that the Fifth Amendment, by itself or by its awkward position in the mere evidence doctrine, cannot be mustered to bar the acquisition of evidence gathered by means of electronic eavesdropping.

Bypassing the Constitution entirely, the mere evidence rule must be regarded as the direct descendant of the ancient common law theory of *deodand.* This doctrine, rooted in medieval superstition, was refined to a principle of property law enabling the Crown to seize articles which the accused was not entitled to possess. In the 13th Century, any personal chattel which had been "the immediate occasion of the death of any reasonable creature" was condemned, fell to the ecclesiastical authorities for purification and thereafter was applied to "pious uses" [1 Hale Pleas of the Crown 419; *Parker-Harris Co.* v. *Tate,* 188 S.W. 54 (Tenn., 1916); Comment, 66 COLUM. L. REV. 355, 363, *supra*]. Such property, forfeit to the Crown because of its illegal use, could never be retrieved by the accused, even if he was subsequently acquitted [see, *Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1066 (1765)]. Not surprisingly, "historians record that the 'pious uses' under the control of the king and his almoner became a scandal which moderns would describe as being graft"

[*Parker-Harris Co.* v. *Tate,* 188 S.W. 54, 55, *supra*]. Consequently, the principle was thought "so repugnant" to American concepts of justice "as not to be included as a part of the common law of this country" [*id.*].

Obviously, a property concept (which has been denounced and discarded even in property law) has little utility as a modern rule circumscribing the production of evidence for use at a criminal trial.

> "The right-to-possession rationalization of the law of search and seizure is too feeble and too contrived to endure * * * it would demean the law to vindicate a search and seizure in terms of a proprietary interest when everyone knows the quest is usually for evidence of guilt and nothing else. It must be that the right-to-possession thesis is quite irrelevant and that the Fourth Amendment does permit the search and seizure of things for their inculpatory worth" [*State* v. *Bisaccia,* 45 N. J. 504, 213 A.2d at 187, *supra*].

Beyond these considerations, an argument of policy is sometimes offered in approval of the allegedly restrictive effect of the rule upon searches. Thus, in *United States* v. *Poller* [43 F.2d 911 (2d Cir. 1930)], the Circuit Court found "no sound policy" underlying the mere evidence rule, but suggested that perhaps the rule tends "to limit the quest." Amicus leaps upon the language and terms the limitation of the search itself as "the real aim of the *Boyd-Gouled* doctrine" (N.Y.C.L.U. brief, p. 16). But while the rule might prevent the issuance of search warrants in certain cases, the limitation imposed is arbitrary and unrelated to Fourth Amendment principles. And, as a matter of constitutional law, it is the Fourth Amendment,

and the Fourth Amendment alone, which should control the nature and extent of searches.

Realistically, the fact that mere evidence can not be named as the object of a warrant has little or no tendency to limit searches. The warrant, by good faith mistake, may issue to search for non-existent evidence, which is a far broader search than for specified mere evidence. Also, if there is probable cause to believe mere evidence can be found, there is usually equal reason to believe instrumentalities can be found as well. Indeed, there are few items which can be clearly classed as mere evidence only, outside the all embracing classification "instrumentality" for purposes of the warrant.

Furthermore, the mere evidence rule does not noticeably inhibit inspection of mere evidence in the search for other evidence. A police officer conducting a search has wide latitude. He may search any place where the object of his hunt may be hidden, which, in some cases, may mean everywhere in the premises [see, *Harris* v. *United States,* 331 U. S. 145 (1947)]. The search frequently includes prying into drawers, closets, and other private recesses, viewing the "mere" along with the non-evidence, while hunting for contraband, instrumentality or fruit of crime. Thus, the scope of the search is not affected by the mere evidence rule at all. In fact, it is easy to posit situations where a greater invasion of privacy is required by the search for an instrumentality than for mere evidence. A search for a corpse will be necessarily more restricted than a search for a capsule of heroin. So the limitation of the quest is fixed to a large extent by the physical dimensions of the object

sought, not the legal category into which it may fit. As Chief Justice TRAYNOR has observed:

> "The rule does not prevent exploratory searches at all; it prevents the seizure of mere evidence in the course of any search, reasonable or unreasonable, specific or general" [*People* v. *Thayer*, 408 P.2d at 110, *supra*].

Of course, the seizure may be circumscribed if mere evidence cannot be taken. But insofar as seizure may be somewhat curtailed by the rule, the limitation is neither dictated by, nor consistent with the Fourth Amendment. For if the mere evidence is relevant and incriminating it is in the same category as other evidence the acquisition of which the permissive clause of the Fourth Amendment authorizes. It cannot be denied that the purpose of a lawful search and seizure is to acquire material which can be utilized as evidence at a criminal trial. And mere evidence such as shoes to match tell-tale footprints [see, *State* v. *Bisaccia, supra*], or a blood sample [see, *Schmerber* v. *California*, 384 U. S. 757 (1966)] or, indeed, a confession, is no less relevant or incriminating than any other type of evidence.

Another weakness in the decrepit rule is the ease with which it is avoided. Efforts to impart strength to it by according the rule false obeisance have resulted in blatant manipulation of its terms and inexplicable inconsistency. Thus, the meaning of "instrumentality of crime" has been expanded in such a fashion as to leave little substance in the old *Gouled* rule. For instance, shoes have been deemed an instrumentality because a criminal does not

commit a crime barefoot [*United States* v. *Guido*, 251 F.2d 1 (7th Cir. 1958); also see, *State* v. *Bisaccia, supra*]; often, the same item is viewed as mere evidence by one court and as an exception to the rule by another [e.g., address book held admissible in *Matthews* v. *Correa*, 135 F.2d 534 (2d Cir. 1943), but mere evidence in *United States* v. *Lerner*, 100 F.Supp. 765 (N. D. Cal. 1951); bloodied clothing mere evidence in *La Rue* v. *State*, 149 Tex. Cr. App. 598, 197 S.W.2d 570 (1946), but admissible in *Boles* v. *Commonwealth*, 304 Ky. 216, 200 S.W.2d 467 (1947); bed sheet admissible in rape case in *State* v. *Chinn*, 231 Ore. 259, 373 P.2d 392 (1962); but handkerchief in crime of perversion mere evidence in *Morrison* v. *United States*, 262 F.2d 449 (D. C. Cir. 1958)]. Even "private papers," ostensibly the material especially protected by the rule, have invariably been admitted into evidence by distinguishing or disregarding *Gouled* [see, *Marron* v. *United States*, 275 U. S. 192 (1927); *Foley* v. *United States*, 64 F.2d 1 (5th Cir. 1933); *Landau* v. *United States Attorney*, 82 F.2d 285 (2d Cir. 1936); *United States* v. *Boyette*, 299 F.2d 92 (4th Cir. 1962); *Davis* v. *United States*, 328 U. S. 582 (1946); Zap v. *United States*, 328 U. S. 624 (1946); *Harris* v. *United States*, 331 U. S. 145 (1947); *Abel* v. *United States*, 362 U. S. 217 (1960)].

In oral evidence cases, this Court has simply ignored the *Gouled* rule although, properly speaking, any incriminating utterance is nothing more than "mere" evidence [*United States* v. *On Lee*, 193 F.2d 306, 314, n. 17 (2d Cir. 1951)]. The seizure of such statements has been many times upheld despite objections based on Fourth Amend-

ment grounds [e.g., *Olmstead* v. *United States*, 277 U. S. 438 (1928); *On Lee* v. *United States*, 343 U. S. 747, *supra*; *Goldman* v. *United States*, 316 U. S. 129, *supra*; *Lopez* v. *United States*, 373 U. S. 427, *supra*; *Rathbun* v. *United States*, 355 U. S. 107 (1957); also see, *Wong Sun* v. *United States*, 371 U. S. 471 (1963)]. Indeed, the mere evidence rule has not been a basis or even a factor in those cases in which overheard statements were excluded [*Silverman* v. *United States*, 365 U. S. 505, *supra*; *Clinton* v. *Virginia*, 377 U. S. 158, *supra*; *Wong Sun* v. *United States*, *supra*], the sole consideration being whether the entry was properly authorized.

Additionally, in three cases decided within the past year the Court has *sub silentio* upheld seizures of mere evidence [*Schmerber* v. *California*, 384 U. S. 757 (1966) (blood sample); *Osborn* v. *United States*, 385 U. S. 323 (1966) (recorded conversation); *Cooper* v. *California*, —— U. S. ——, 87 S. Ct. 788 (1967) (piece of brown paper which matched paper bag used to sell heroin)]. As Chief Justice TRAYNOR concluded in *People* v. *Thayer* [408 P. 2d 108, 112 (1965)], the

> "*Gouled* case is often cited but no longer applied. * * * It has been distinguished to the point of extinction in subsequent opinions by the use of technical exceptions and without discussion of policy. It is universally criticized by the writers and lacks a clear basis in any constitutional language."

Both the *Thayer* and *Bisaccia* cases indicated that the Supreme Courts of California and New Jersey were following the direction of *Ker* v. *California* [374 U. S. 23 (1963)].

Ker permitted the states to develop their own workable rules of search and seizure and recognized that the distinction between constitutional and supervisory rules serves to separate fundamental civil liberties, which the states must respect, from federal procedural rules, which the states may ignore [see, Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929 (1965)]. Thus, opinions written before this distinction assumed its present crucial importance in the federal-state system must now be reinterpreted in this light. In doing so, the California and New Jersey courts have declared the rule of the *Gouled* case to be a federal procedural rule, unrelated to fundamental civil liberties, and thus not binding upon the states. New York, in affirming the instant case, has apparently agreed.

Beyond these legal arguments, the results of literal application of the mere evidence rule would be too absurd for judicial tolerance. As Chief Judge WEINTRAUB convincingly demonstrates in *Bisaccia,* the bloody shirt, shoes to match footprints, bloodstains, or a corpse, all highly probative evidence, cannot be reasonably immune from a warranted seizure [213 A.2d at 192].

In sum, recognizing that the intention of the framers of the Fourth Amendment was to protect the privacy of the citizen from unreasonable searches, it is impossible to understand why the admissibility of the evidence obtained should depend upon whether it is "mere" evidence or merely evidence. The law of evidence contains rules relating to weight, sufficiency, competency or relevancy. The

adjective "mere" has no place in the lexicon of the law of evidence. It is a concept without a meaning.

All of the foregoing discussion has assumed that the eavesdropped conversations in this case were "mere" evidence. If necessary, they may be considered more than that. The crime of which the defendant was convicted was conspiracy, the essence of which is an agreement to commit a crime between two or more persons. An agreement betokens communication, which requires the utterance of words. Thus, if we are compelled to play the common game of avoidance, we would say, with more than the usual warrant, that in this case, the corpus of the crime, the instrumentality of the crime, the means by which it was committed, and indeed the crime itself were the spoken words [see, *Lopez* v. *United States,* 373 U. S. 427 (1963); *United States* v. *Borgese,* 235 F. Supp. 286, 293 (S.D.N.Y. 1964); Comment, 66 COLUM. L. REV. 355, 369, n. 94, *supra*].

The particularity of the warrant argument

Apart from the mere evidence claim, it is argued that an eavesdropping warrant is incapable of "particularly describing the * * * things to be seized," since only the general nature of the discussions are known in advance. This claim, however, is rebutted by analogous search warrant decisions.

There are inherent limits on particularity in the description of evidence not yet in hand, whether it be verbal or tangible. But this failure of precognition should no more vitiate an eavesdrop order than it destroys a search war-

rant. And warrants describing "intoxicating liquors" without stating the type, or "narcotic drugs" without naming the specific drug, or "gambling paraphernalia" without attaching an inventory have all been deemed sufficient [see, *Stanford* v. *Texas*, 379 U. S. 476, 486 (1965); *People* v. *Montanaro*, 34 Misc. 2d 623 (Kings Co. 1962); *Johnson* v. *United States*, 46 F.2d 7 (6th Cir. 1931); *Calo* v. *United States*, 338 F.2d 793 (1st Cir. 1964); *Sutton* v. *United States*, 289 F. 488 (5th Cir. 1923)]. Subpoenas designating "all records, correspondence, and memoranda" relating to specified subjects have been deemed to specify with "reasonable particularity" the objects sought, since it was not known precisely what records were kept by the organization being investigated [*McPhaul* v. *United States*, 364 U. S. 372 (1960)]. In these cases the object of the search is recognizable as such to the searchers, and thus differentiated from non-seizable articles. Consequently, greater leeway is accorded in the description of such property than in a case where the articles may be easily confused with innocent material, as, for example, where stolen furniture is inadequately distinguished from furniture which may be usually found on a premises [*People* v. *Coletti*, 39 Misc. 2d 580 (Westchester Co. Ct. 1963)].

Hence, contrary to petitioner's claim, a warrant for words is as capable of specificity in the description of the evidence sought as is the conventional search warrant. Each is adequately particular when the subject is recognizably distinguishable by its relationship to a designated crime. The Fourth Amendment requires no more, for the demands of exact description are responsive to the dictates

of common sense. It would surely be hypertechnical to read the Fourth Amendment as requiring prior specification of particular words where the same degree of exactness in description is not obligatory in a search for tangibles [to the same effect, see Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 MINN. L. REV. 891, 912-913 (1960); Comment, 66 COLUM. L. REV. 335, 373, *supra*].

In the present case, an acceptable level of specificity in the critical order is found by reading its direction to obtain "any and all conversations" in conjunction with the affidavit, which it adopts by reference [see, *Steele* v. *United States,* 267 U. S. 498 (1925); *Johnson* v. *United States,* 46 F.2d 7 (6th Cir. 1931); *United States* v. *Kaplan,* 16 F.2d 802 (D. C. Mass. 1926); *United States* v. *Edwards,* 296 F. 512 (E. D. Mich. 1924)]. So read, the order directs seizure of oral evidence pertaining to an investigation of official corruption in the State Liquor Authority, and specifically to monitor conferences "relative to the payment of unlawful fees to obtain liquor licenses" (R. 686). Accordingly, in the search for words here in issue, although no one knew in advance the exact language which would be used or the precise turn the conversation would take, nevertheless a direction was issued to the police under which they could readily distinguish the incriminating evidence sought from innocent discussions. This ready recognizability is the touchstone of a definite and particularized warrant, and as the instant case demonstrates, an order for the seizure of words can meet constitutional criteria of particularity.

The generality argument

It is claimed that since all conversations taking place in a room are heard by eavesdropping devices, the "search and seizure," necessarily indiscriminate, is unconstitutionally general. The argument rests upon a common but false blending of the terms "search" and "seizure."

Obviously, search and seizure are closely related, but they are separate events, separately treated in the Constitution and case law, as well as logically distinct. The Fourth Amendment exerts different controls on them, requiring a warrant to specify only the "place" to be searched, while it must specify the "thing" to be seized. Thus distinguished, an illegal search is not validated by what is seized [*United States* v. *Di Re,* 332 U. S. 581 (1948)], nor is an illegal seizure valid because the search was within lawful bounds [*Kremen* v. *United States,* 353 U. S. 346 (1957); *United States* v. *Poller,* 43 F.2d 911 (2d Cir. 1939)].

The distinction between search and seizure is readily apparent in the case of tangibles, and it holds by analogy in the more difficult area of intangibles as well. The search is the process of looking for the thing to be seized; the seizure is the reduction of that object to physical possession. It should therefore be clear at the outset that seizure cannot be equated with perception. Perception is the hallmark of a search, which is necessarily broader than a seizure. Were mere apprehension by the senses deemed a seizure, virtually all searches would be condemned as too general. Indiscriminate perception characterizes the search; selective acquisition distinguishes the seizure. As optic observation cannot be considered a seizure, neither can the act of listening, for "a man searches when he looks and listens"

[*On Lee* v. *United States*, 193 F.2d 306, 313 (2d Cir. 1951); *Lopez* v. *United States*, 373 U. S. at 459, opin. of Justice BRENNAN; *District of Columbia* v. *Little*, 178 F.2d 13, 18 (D. C. Cir. 1949), aff'd 339 U. S. 1 (1950)].*

Moreover, the recording of what is perceived cannot properly be termed a seizure either. Certainly a photograph of a premises does not take possession of all the articles in the picture, nor does the making of a written inventory of observed articles reduce them to possession or convert the action into a general seizure. The same is true of tape recordings, which are similarly an aid to memory, and coextensive with perception.

> "So, just as looking around a room is searching, listening to the sounds in a room is searching * * * And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching" [*On Lee* v. *United States*, 193 F.2d 306, 313, *supra*, opin. of Judge FRANK].

Recognizing the distinction between search and seizure of intangibles, the question remains: when does a seizure of spoken words occur? Can a point be fixed where the

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* While it is often said that observing something in open view is not a search, but at most an inspection, the distinction is not clear or convincing. As was remarked in *District of Columbia* v. *Little* [178 F.2d 13, 18, *supra*]:

> "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. 'Inspect' means to look at, and 'search' means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

seizure's essential feature of selectivity can operate? The clue to resolution is provided by cases dealing with tangible evidence which is seen, but not physically possessed [see, *Zap* v. *United States,* 328 U. S. 624, 629 (1946); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920); *McGinnis* v. *United States,* 227 F.2d 598 (1st Cir. 1955); *Williams* v. *United States,* 263 F.2d 487 (D. C. Cir. 1959)]. Those cases noted that there is no distinction between physically taking the objects and introducing testimony relating to them in court, or in using them as "leads" to other evidence. Thus, in addition to physical seizure, a constructive seizure of tangibles may occur by virtue of their use.

By the same logic, reception of oral evidence—incapable of physical possession—amounts to a seizure only when use is made of conversations. And so viewed, the seizure is impermissibly general only if the use extends beyond conversations specified in the warrant. In the present case, no evidence procured through eavesdropping was used or introduced at the trial other than the conversations which directly pertained to the conspiracy to bribe, the object of the search. Consequently, there was no seizure beyond the mandate of the warrant.

It should be noted in passing here that a line of authority upholds the seizure and use of evidence not specified in a warrant but discovered in the course of a warranted search. [See, *United States* v. *Eisner,* 297 F.2d 595 (6th Cir. 1962); *Johnson* v. *United States,* 293 F.2d 539 (D. C. Cir. 1961); *United States* v. *Howell,* 240 F.2d 149 (3d Cir. 1956), aff'g sub nom. *United States* v. *Howard,*

138 F.Supp. 376 (D. C. Md. 1956); *Bennet* v. *United States*, 145 F.2d 270 (4th Cir. 1944); *United States* v. *Old Dominion Warehouse*, 10 F.2d 736 (2d Cir. 1926). *But see*, *Marron* v. *United States*, 275 U. S. 192 (1927)]. If such seizures resist attack on Fourth Amendment grounds, then an otherwise valid eavesdrop should allow use of unexpected conversations relating to crimes other than those to which the investigation is directed [see, *People* v. *Grossman*, 27 A.D.2d 572 (2d Dept. 1966)]. But the question is not presented here.

The use test here proposed, it may be argued, exempts "intelligence" surveillance from the warrant clause of the Fourth Amendment; if no use is contemplated beyond scouting, no seizure occurs, and the eavesdroppers are beyond constitutional control. The answer is twofold: first, searches without seizures of tangible property are likewise beyond direct Fourth Amendment control, since the enforcement of the constitutional ban is by an exclusionary rule of evidence which necessarily operates only where use is attempted; second, since unauthorized search by electronic surveillance is a grave invasion of personal security, it should be, and is in New York, deterred by specific criminal sanction penalizing the intrusion without regard to whether a "seizure" occurs.

Turning from the seizure of speech to the search, the fact that other conversations not pertinent to the criminal activities described in the order may also be overheard does not brand the search unconstitutionally general. The same broad exposure occurs in a search for physical material. For a search warrant for tangible articles author-

izes the police to look throughout an area, sifting through innocent and innocuous materials in the hunt for the specific objects designated in the warrant. It is not, however, considered an impermissible general search when articles not described are seen by the searchers. Why, then, should the fact that the searchers hear extraneous conversation transform their quest to a general search? The only distinction is in the sense by which the innocuous is perceived. Looking for specified tangibles is as indiscriminate as listening for specified intangibles, for a search is by its nature indiscriminate. The Fourth Amendment only restricts the extent of the search by limiting the physical area of its occurrence, requiring the warrant to particularly describe "the place to be searched" or allowing a reasonable search to cover only the immediate environs of a defendant's arrest.

It is argued, however, that the search for speech is general because of the duration of an eavesdrop. While presumably an electronic surveillance for five hours would be no more a general search than the five hour quest for tangible evidence upheld as proper police action in *Harris* v. *United States* [331 U. S. 145 (1947)], the order in the instant case permitted a sixty-day eavesdrop, and the conversations ultimately introduced in evidence were recorded almost a fortnight after the eavesdrop was installed (R. 286-7, R. 294-5, R. 347-8). Does that temporal factor invalidate the search?

There is, of course, no mention in the Fourth Amendment of how long a search may last; the provision speaks in terms of space. For tangible items occupy space, and

consequently are searched for in space. It is therefore natural to impose a spatial limitation on the hunt by designating the area in which the article may be located. Thus, a quest for tangibles implicitly allows the reasonable time needed to search the described area, rarely longer than a few hours. Conversations, however, exist in time only. The reasonableness of a search for intangibles, therefore, must be measured in terms of the time reasonably necessary to find the proper object of the search. Of course, physical objects also have temporal existence as conversations have spatial aspects, being confined to a limited area. Thus, in New York, search warrants for tangibles must be executed within ten days of issuance [N. Y. Code Crim. Proc. §802] and searches without warrant must be "contemporaneous" with the arrest. Similarly, eavesdrop orders must specify the place to be searched. But as the spatial breadth of a search for physical items may vary according to the requirements of the case, the time reasonably necessary to search for conversations will vary also. Concededly, of course, a search in time may become general if it lasts beyond the period in which the evidence may be expected to be found, as a search in space may become general if it exceeds the boundaries within which the evidence may be located.

As precise foreknowledge may permit a search warrant to be drawn for a narrowly described place, so there may be cases where a short eavesdrop is adequate. Where, for example, a single transaction is expected at a known time, the order should authorize a brief installation. In other circumstances, the hour of the expected criminal utterance can not be predicted. Or, as in the instant case, the crimi-

nal activity may be a conspiracy, a continuing crime with extended negotiations and repeated encounters and multiple facets. The "Tenement Club" conspiracy, involving negotiations between Jacklone (the proprietor), Neyer (a corrupt lawyer), Steinman (whose office was wired) and Berger (the petitioner), on several occasions and in various combinations, continued throughout the months of May and June, 1962. In the "Playboy Club" conspiracy, the criminal activities lasted from the summer of 1960 until December, 1962. Under such circumstances, the duration of the orders here was hardly unreasonable. In any event, the evidence was obtained within thirteen days, and any subsequent period of surveillance would not retroactively invalidate what was heard in the initial reasonable time [see, *United States* v. *Mitchell*, 322 U. S. 65 (1944); *McGuire* v. *United States*, 273 U. S. 95 (1927)]. And, indeed, to provide scope for appropriate orders in investigations of the length and complexity of the District Attorney's probe into the corrupt practices of the State Liquor Authority, which resulted in several indictments and convictions beyond the one before this Court, a statute which allows for orders up to sixty days is not an unreasonable exercise of police power. Of the four states other than New York which recognize the need for regulated eavesdropping, two, like New York, deem sixty days a reasonable maximum for effectiveness of an order [Nevada Rev. Stat. §200.660 (6); Oregon Rev. Stat. §141.720 (6)], one chooses thirty days [Maryland Ann. Code, Art. 27, §125A (c)], while the remaining one sets a three month maximum [Massachusetts Gen. Laws Annot., Chapt. 272, §99].

The curtailment of speech and infringement of privacy arguments

Petitioner's amicus argues that eavesdropping "necessarily deprives those within its range" of freedom of speech (N.Y.C.L.U. brief, p. 24), contending, apparently, that those whose conversations are monitored become reticent and uncommunicative in the chilling beam of the interception. But the damping of speech can only occur if the speakers know or suspect that they are being overheard, while eavesdropping relies on secrecy for its effectiveness. Moreover, the chill described by amicus is not caused by electronic devices per se, but by the surveillance which they aid. Had Lopez and Osborne suspected that the people they trusted were working against them, their speech would have been restricted in the same way as Hoffa's or Lewis', had they suspected. The fact that the former two cases involved secret recording devices carried by secret agents does not distinguish them for First Amendment purposes from the latter two, where the recordings were solely by memory.

Amicus, however, broadens his approach and also argues that a systematic use of electronic devices will inevitably curtail speech, citing the practice and results in Nazi Germany and George Orwell's *1984* (brief, p. 29). Justice BRENNAN has similarly observed that if electronic eavesdropping becomes "sufficiently widespread * * * the hazard that as a people we may become hagridden and furtive is not fantasy" [*Lopez* v. *United States*, 373 U. S. at 470]. But such rampant eavesdropping is no more possible when subject to court order and judicial control than are noxious general and exploratory searches under present

search and seizure restrictions. Limited use does not automatically lead to widespread abuse. For instance, in New York County, the files of the District Attorney's Office disclose that in the seven years from 1960 through 1966, inclusive, 152 eavesdrop orders were granted by the courts, an average of 22 per year.* Thus, controlled eavesdropping hardly warrants widespread fear that "Big Brother is watching."

In truth, it is not the limited government application of eavesdropping techniques that creates the intrusion anxiety; it is the ready availability of miniature and potent electronic devices, tempting widespread lawless use. When personal whim and a modest financial outlay can enable the curious citizen to inject his invisible presence into another person's life, then indeed the general public may widely suspect the unseen and unwelcome intruder. The fear here is fear of a wrong, a serious trespass on privacy, and, like other wrongs which frighten the community, it is combated as a crime in New York where eavesdropping without court order is a felony [Penal Law §738 *et seq.*]. In 1966 in New York County, 29 different defendants were charged in ten indictments for violation of that law. It is, therefore, unjust to compare eavesdropping in New York with its use under the jurisdictions of Hitler and Big Brother, and unfair to equate its effect upon freedom protected by the First Amendment with the results in the Third Reich and Oceania.

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* Since eavesdropping was authorized by the enactment of Section 813-a of the Code of Criminal Procedure in 1958, the yearly number of orders obtained by the District Attorney's Office of New York County was as follows: 1958—3; 1959—3; 1960—14; 1961—22; 1962—32; 1963—26; 1964—24; 1965—11; 1966—23.

The Civil Liberties Union, amicus, eloquently exposits that the First Amendment assures the freedom to choose one's auditors. Eavesdropping, in this view, "tears at the very fabric of human relationships: the selection of those to whom one will communicate" (N.Y.C.L.U. brief, p. 26). It is a novel but provocative theory. An added dimension is suggested for a right hitherto regarded as protecting the content of speech and diversity of belief. In the abstract, the notion is undeniably appealing, though remote from the well established principle upon which the Amendment rests.

Surely, the First Amendment does not allow, nor is it designed to encourage, the deafening of the governmental auditor to words spoken in or about the commission of crimes [*Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490, 498 (1949)]. Eavesdropping, then, which perceives unprotected speech, can not be faulted on First Amendment grounds for having expanded the speaker's intended audience. And a valid order must be directed to such exempt speech. Therefore, the amicus' argument founders on the facts of the instant case.

But to accord the point its due, the incidental innocent conversations heard by the unseen ear must be considered. An effort of mind is required to refrain from discussing this question in Fourth Amendment terms. For viewed as a search and seizure, as we do elsewhere, the perception of the innocuous is a tolerable concomitant of the authorized quest for the incriminating. But can the same be said for the involuntary communication to government of the innocuous speech as a First Amendment matter? No author-

ized quest is blessed by the First Amendment. Assuming that the First Amendment is therefore offended by this abridgment of the freedom to choose one's hearers, and acknowledging at the same time that the Fourth Amendment authorizes the perception of innocuous words in the course of a warranted search, a collision between the Amendments is unavoidable. Such a momentous conflict must be resolved in favor of the permissive Fourth Amendment, else the First will destroy the Fourth. Indeed, if the First Amendment be read as the freedom of selective silence, it would support a witness' refusal to testify in court if he disliked being audited by the jury. Such distended compass of the Amendment could thereby jeopardize the judicial process itself.

Reading the Fourth Amendment as a limit on the First, insofar as a search for words written or spoken is concerned, does not nullify the principle of free speech. For the expression protected is, by nature, a spreading phenomenon, the echoes of which often resound in quarters unsuspected by the speaker. It is futile to attempt artificially to curtail these inevitable reverberations. Hence it is false to view their perception by government as a force tending to restrict the original utterances.

As has been observed, the application of the First Amendment in this way is "curious" and unconvincing, for it "injects a 'freedom from' claim into a concept that has always signified 'freedom to do' " [Beaney, *The Constitutional Right to Privacy in the Supreme Court,* THE SUPREME COURT REVIEW OF 1962, pp. 249-50; Comment, *Eavesdropping and the Constitution: A Reappraisal of the*

Fourth Amendment Framework, 50 MINN. L. REV. 378, 397-400 (1966)]. Perhaps what is really meant by the right to choose one's auditors is "the right to privacy," a subject treated at some length in *Griswold* v. *Connecticut* [381 U. S. 479 (1965)]. Petitioner, however, makes no more than passing reference to the case (brief, p. 49), and properly so. In striking down a state anti-contraception law, Justice DOUGLAS felt that the statute violated the marital relationship, which falls within a "zone of privacy" created by the "penumbras" of the First, Third, Fourth, Fifth and Ninth Amendments. Justice GOLDBERG, joined by the CHIEF JUSTICE and Justice BRENNAN, found the "right of privacy in the marital relation" protected by the Ninth Amendment alone. Justices HARLAN and WHITE concurred on Fourteenth Amendment grounds, and Justices BLACK and STEWART dissented, observing that there is no "general right of privacy" in the Constitution. Aside from the fact that it was not subscribed to by a majority of the Court, the treatment in *Griswold* of the right to privacy does not embrace eavesdropping. The right to privacy described in Justices DOUGLAS' and GOLDBERG's opinions was specifically limited to the marital relationship, a "fundamental and basic * * * personal right." The eavesdropping in the present case, of course, only made the state privy to a *mariage de convenance* between criminal conspirators. While the relationship may be intimate, it is not reserved to the People under the Ninth Amendment nor protected by the penumbras of any other provision. Any extension of the *Griswold* "right to privacy," except as it may be guarded as a corollary of the Fourth Amendment, would be as unwise as it is unwarranted.

The essential repugnance argument

Not too far in the background of even the most erudite denunciation of electronic surveillance is a wave of revulsion. The secret ear of the state, the invisible policeman posted in a home or office, are repugnant to cherished ideals of free men. And such visceral reactions to law enforcement methods raise due process questions. Hence, it is not without relevance to explore the basis for this abhorrence to judge whether court-ordered eavesdropping can be justly relegated beyond the pale of due process.

Evidence of crime is usually barricaded inside the private confines of human minds, dwellings, or business premises. Access is resisted by the common reluctance of witnesses to become involved in the processes of criminal justice, as well as by the malefactor's wish to escape detection. Consequently, virtually all investigation of crime entails some official intrusion into areas of people's lives which they would prefer to maintain inviolate. For society's command to prosecute the offenders necessarily implies a mandate to probe within the domains of privacy. The search by warrant, the subpoena's command, the persistent visual surveillance, all rend the curtain of preferred isolation to discover and pry loose the fragments of evidence out of which a criminal case is built. Thus, the famous words of Justice BRANDEIS that the Bill of Rights embodies the greatest of all freedoms, "the right to be let alone" [*Olmstead* v. *United States,* 277 U. S. 438, 478 (1928)], must be read as a summary of specifically enumerated rights, rather than a right in itself.

In this context, the issue of intrusion becomes one of degree: have electronics too greatly enhanced the power of

the police, threatening to demolish utterly the castle of privacy? It is as useless to argue whether an eavesdrop is a greater invasion than a conventional search, as it is to debate whether a search of a person's premises is a greater affront than interrogation. The offensiveness of the form of intrusion depends on the circumstances. All are assaults on privacy; all require a regrettable bowing of personal pride to official duress. In all, the police are subject to judicial review for arbitrary and excessive exercise of power. Pursued with restraint, however, all are part of the tax exacted to pay for the benefits of community living, and condoned by the Constitution and due process.

The case which comes first to mind in this connection is, of course, *Irvine* v. *California* [347 U. S. 128 (1954)]. That case, however, was decided under the non-exclusionary rule of *Wolf* v. *Colorado* [338 U. S. 25 (1949)], which Justice JACKSON admired [338 U. S. at 136-137], so there could be no reversal on Fourth Amendment grounds. Considering the "shock" aspect of the police conduct, however, both the majority and Justice CLARK, concurring, declined to enlarge the doctrine of *Rochin* v. *California* [342 U. S. 165 (1952)] to permit an *ad hoc* assessment of the degree of revulsion in each case. As stated by Justice CLARK, "I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as *Rochin,* would serve a useful purpose" [347 U. S. at 139]. Justices BLACK and DOUGLAS, dissenting, would have reversed strictly on Fifth Amendment grounds, eschewing discussion of the Fourteenth Amendment except insofar as they believed it made the Fifth applicable to the states. Only Justices FRANKFURTER and BURTON would have

reversed Irvine's conviction on *Rochin*-Fourteenth Amendment grounds. And it is obvious from Justice FRANKFURTER'S opinion that the moral offensiveness which he found in the police conduct was in the lawlessness of the search and seizure under *Wolf* v. *Colorado* principles. For the eavesdrop in *Irvine* was unwarranted by court order. Had the installation of the microphone been sanctioned in *Irvine* by a judicial showing of probable cause, as it was in the instant case, it seems highly improbable that "shock" would have been an element in the case, or that Justice FRANKFURTER would feel the police conduct so reprehensible as to violate due process. In *Rochin*, Justice FRANKFURTER, defending the vague and variable nature of Due Process, set forth the criteria for adjudging official conduct shocking to fundamental canons of decency "implicit in the concept of ordered liberty" [*Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)]: "bound to offend even hardened sensibilities," "too close to the rack and the screw," "afford[ing] brutality the cloak of law," "offensive to human dignity." These phrases culled from the decision, and considered with the outrageous facts of that case, serve to put the present eavesdropping case even further from the impact of due process as construed in *Rochin*.

Parenthetically, it should be stated that, consistent with the position expressed herein, no evidence gathering technique which threatens privacy should be exempt from the judgment of applicable constitutional principles. Hence, as we have viewed the physical intrusions test of electronic penetration outmoded, so we see the wiretap-eavesdrop distinction as artificial and inconsistent with governing theory. As eavesdrops ride or fall on their obedience to the Fourth Amendment, so should wiretaps. But for the

technique employed, the interception of a telephonic communication intended to be private is no different than the interception of a face-to-face exchange. With the just demise of the internal-external distinction of the *Silverman-Goldman* dichotomy, *Olmstead* becomes an anomaly.

In summary, court-directed electronic surveillance, although a distasteful method for the acquisition of evidence, is no different in kind from a variety of conventional and long-sanctioned intrusions into people's private lives and affairs. In degree, it cannot be branded in all circumstances a significantly greater penetration than other means of gathering evidence. For, in truth, virtually all criminal investigations delve into domains of privacy to recover incriminating secrets. With all, court supervision under the standards of the Fourth Amendment is the only possible protection for the citizen. The vague Fourteenth Amendment concept of due process has been rightly viewed by the Court as too variable and inexact a standard to measure fine difference in degree on an *ad hoc* basis and is, therefore, largely restricted to the brutal, and indeed criminal excesses of the *Rochin* type of case. Court-authorized eavesdropping is far from that. It could not even raise the repugnance level of the *Irvine* dissenters to the threshold of due process. Moreover, the utilization of electronic aids is an indispensable tool of law enforcement in the search for otherwise inaccessible evidence inculpating the secret conspirator, racketeer, and corrupt official whose serious crimes often have no immediate victim and hence seldom leave a discernible trail. The instant case illustrates this need, which in social magnitude must counteract any special antipathy stimulated by the particular device employed.

POINT II

Electronic surveillance, conducted within the limits of the Fourth Amendment, is an indispensable adjunct of society's obligation to discover evidence of crime.

The participation of the petitioner, Ralph Berger, in a widespread, covert and corrupt scheme to buy and sell the power of a state licensing agency is only an isolated case in a national plague threatening the integrity of our government and the safety of our society. Overstatement of the ravages of organized racketeering and its handmaiden, municipal corruption, is almost impossible. The frequent alarums sounded by law enforcement authorities have now been thoroughly and irrefutably documented by a Presidential Commission. In addition, the remarkable brief of the National District Attorney's Association and others, amicus in support of respondent, paints a vivid and terrifying picture of the structure and activities of the underworld.

The statute law of New York authorizes the utilization of electronic surveillance to combat the menace of serious local crime. It is an extraordinary technique to meet an extraordinary danger to the security of law-abiding citizens and to their confidence in their government. More, it is a protection for the free people of the community against the abuses of power within the government itself.

Yet, petitioner, his amicus, and some highly placed public officers, rejecting such effective means to these vital objectives, would limit electronic probes to cases "affecting the national security" (pet. brief, pp. 36-37). This sug-

gestion, of course, implicitly acknowledges that all eavesdropping is not constitutionally prohibited. When he comes to offenses he deems grave, petitioner is apparently willing to abandon the arguments—so fulsomely expressed—describing allegedly fundamental and irremediable infirmities inherent in all eavesdropping. Beyond this internal inconsistency in his position, the suggestion of petitioner is unwise and unsound.

Acts "affecting national security" are not amenable to neat definition. While they certainly include sabotage, espionage, and treason, it is too well known that a liberal interpretation of the phrase leads easily to the treacherous area of opposition to the government through political dissent. It therefore must be recognized that while the employment of eavesdropping in national security cases may indeed be salutary, such application also poses the greatest danger to the freedoms protected by the First Amendment, amicus' chief fear.

Moreover, the safety of the community is not endangered solely by enemies whose crimes undermine the federal government by treason. Other crimes pollute and cripple state and national government. They are no less pernicious. Surveillance of the domestic activities of foreign enemies should protect a society, government, and economy uncorrupted by internal rot and free of devastating local crime.

The recent Report by the President's Commission on Law Enforcement and Administration of Justice, entitled *The Challenge of Crime in a Free Society* (hereafter, cited

as the President's Report) has detailed with admirable clarity and thoroughness the activities, structure, scope, and threat of organized crime and official corruption [see President's Report, chap. 7, pp. 187-209]. Particularly, it noted the disastrous effects of organized criminal activity on government. For not only is the emasculation of law enforcement "central to organized crime's operations," but corruption of government officials is intimately linked with the expansion of criminal syndicates.

> "All available data indicate that organized crime flourishes only where it has corrupted local officials. As the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of government has grown. And as government regulation expands into more and more areas of private and business activity, the power to corrupt likewise affords the corrupter more control over matters affecting the everyday life of each citizen" [*ibid.* p. 191].

Indeed, the President's Report stated, "the purpose of organized crime is not competition with the visible, legal government, but nullification of it" [*ibid.* p. 188]. The same purpose, it may be observed, motivates crimes of sabotage. Certainly, a state legislature must be endowed with the power to guard against the subversion of local government. To preserve the integrity of state governments against the debilitating effect of corruption, authority must be conferred upon the executive arm to search for the illegal activities of organized crime.

Petitioner, however, suggests that criminal prosecutions be purged of the sordid business of eavesdropping, and instead infected departments should "clean up * * * official

corruption on the administrative level" (brief, p. 43). Whether petitioner would allow such disgraceful procedures to degrade the majesty of the administrative process, he discreetly declines to say. But apart from his misguided sense of delicacy concerning the criminal process, his suggestion suffers from a disingenuous naivete. Can he conceive of Martin Epstein, the former Chairman of the State Liquor Authority, initiating an administrative clean-up program of his graft ridden office resulting in his own disgrace? Does he forget that the criminal investigation resulted in the indictment of the Commissioner himself? And what of the petitioner? Should his crimes be excused because he is not employed within the administrative structure? And what would he say about L. Judson Morhouse, former state political boss who resigned his public offices but was thereafter convicted for his part in the S. L. A. scandal? The honest people of the community would be shocked to hear that bribery of public officials was no longer a punishable offense. If officials are no longer subject to criminal penalties, the public might justly deem the state unworthy to cast a stone at others.

The pervasive and deeply disturbing impact of organized crime and corruption is, in a sense, invisible [President's Report, p. 187]. Usually without a specific victim, racketeering and vice need fear no complainant's testimony. By definition a crime of mutual agreement and accommodation, bribery is rarely reported to the authorities. Seldom, too, does an outsider encounter those who direct the operation in which he is caught, his contact being limited to the low ranking and expendable cogs in the criminal machine. When Ralph Pansini, a liquor license appli-

cant, asked to confer directly with Commissioner Epstein who was demanding a bribe, he was told that it was "out of the question; that Mr. Epstein doesn't want to even know Mr. Pansini's name; he doesn't even want to know what he looks like or even meet him" (R. 26).

The chart of "an organized crime family" in the President's Report [p. 194] differs from a corrupt state agency only in its complexity and added links in the chain of command. The leader surrounds himself and deals only with trusted lieutenants, who are also enmeshed in the criminal conspiracy. The inescapable fact is that the ordinary tools of criminal detection are too blunt to strip the protective insulation from conspiratorial organizations. Law enforcement infiltration of organized crime rings is "precluded" by "the extreme scrutiny to which potential members are subjected and the necessity for them to engage in criminal activities" [President's Report, p. 201]. Underlings cannot normally be enlisted to give evidence against their superiors, for they are usually unwilling to break a code of silence enforced by fear of reprisal. "The code not only preserves leadership authority but also makes it extremely difficult for law enforcement to cultivate informants and maintain them within the organization" [*ibid.* p. 196]. And even if they can be persuaded to cooperate, they "cannot implicate the highest level figures, since frequently they have neither spoken to, nor even seen them" [*ibid.* p. 201]. The king may be temporarily checked by the capture of his pawns, but never checkmated. Thus, in the vital investigation of these crimes, the normal wells of evidence are virtually dry. Absent complaint, witness, or hope of productive interrogation, law enforcement agents are virtually

helpless without recourse to such extraordinary measures as electronic surveillance.

Sometimes, of course, as in the present case, the conspiracy lacks disciplinary power. Co-conspirators may then be more amenable to cooperation with the authorities once they have been caught and convincingly implicated. Seeking to lighten sentences or avoid the necessity of perjuring themselves before a grand jury, they may turn state's evidence. Thus, after his own conviction, the petitioner, Ralph Berger, testified against another co-conspirator, L. Judson Morhouse, at a trial in which the former chairman of the State Republican Party was convicted for his part in the Playboy conspiracy. But in order to develop such witnesses, evidence of their participation must first be acquired as leverage.

However, even the rare turncoat or cooperative bribegiver does not provide a prima facie case in those jurisdictions, like New York, where no conviction may be had on the uncorroborated testimony of an accomplice [N. Y. Code Crim. Proc. §399]. So in the present instance, the tape recordings independently verified the stories of Jacklone and the several Playboy officers, corroborating the existence of the conspiracies and the roles of the conspirators.

In addition to racketeering and corruption, law enforcement is concerned with crimes which imperil the peace and safety of the streets and homes of a community. Here too, the normal investigative springs are often exhausted without more than a strong suspicion concerning the perpetrator. The inherent difficulties and manpower cost in the in-

stallation and maintenance of a listening post restrict its use to the most serious and stubborn of a community's crimes. But in these instances, conversion of probable cause to proof beyond a reasonable doubt can often be accomplished only by unusual methods for the acquisition of evidence.

Illustrative of these conclusions are the investigations in which the New York County District Attorney's Office has used court-ordered electronic surveillance. While the overlap of pending cases with convictions in various probes has made a complete compilation of eavesdropping cases impracticable, a representative selection of cases demonstrates equally well the indispensability and effectiveness of electronic searches, while indicating the kind of case in which eavesdropping has been used.

The infiltration of organized crime into legitimate business has reduced the ethics of affected enterprises drastically. In the Merkel Meat scandal, it resulted in an extremely grave health hazard. Investigation of this prominent meat processing concern in connection with suspected commercial bribery revealed that certain products were adulterated. Further investigation suggested that accident did not account for the presence of the impurities. Little positive proof could be obtained, however, until an eavesdrop was authorized by the court. Once installed the device revealed a flourishing conspiracy to supply the consumer with inedible and diseased meats.

Conversations between the president of Merkel Meats, Inc. (Norman Lokietz) and a meat broker and noted loan

sharker (Charles Anselmo) revealed that the Merkel management had conspired to adulterate its product not only with horsemeat, but with the flesh of diseased cows and carrion. Called before the grand jury, the president and vice-president, Samuel Goldman, both perjured themselves, and were indicted for that crime as well as conspiracy to sell inedible meats. The recordings convincingly contradicting their grand jury statements, both officers decided to cooperate with the authorities. Additionally, subpoenas, based upon leads obtained from the eavesdrop, were sent to other individuals and corporations, eliciting corroboration and evidence showing the method and extent of the conspiracy. For the proof demonstrated that Anselmo had purchased his supplies from animal food suppliers and packaged it as fit for human consumption. By bribing a federal inspector, he had placed counterfeit inspection stamps on the cartons and sold them to Merkel, who knowingly passed the contents on to the consumer. Indicted for selling adulterated and mislabeled foods, Anselmo interrupted his trial to plead guilty to that charge and to conspiring with Lokietz. The president of Merkel also pleaded guilty to the same conspiracy count, and the vice-president Goldman pleaded guilty to perjury.

Organized crime has also gone into business for itself. In another New York case, Anthony Lombardozzi, the defendant, and nine others contrived a "bust-out" operation. Under such a scheme, a store is opened and builds credit with suppliers by promptly paying for goods for several months. Then, stocking a large inventory on credit, ostensibly to meet a consumer demand, the store is suddenly closed, the owners disappear, and the goods are spirited

away to be sold at a clear profit. Naturally, proof of such a larceny by false pretense depends entirely upon establishing that the storeowners have no intention of paying for articles ordered. In this case, the ten defendants combined to open a store named Co-Op Discount Stores, Inc. To all appearances a legitimate business, the company paid for purchases religiously and on time for a six-month period. An eavesdrop device, installed upon information as to the real nature of the business, disclosed that the owners were not intending to pay for merchandise delivered after December 8, 1963. By that time, the store would have received a quarter of a million dollars of goods on the pretext that a large inventory was needed for the Christmas season. Actually, the defendants intended to shut the premises and melt away with the merchandise. The conspirators were arrested on December 9th as they were carting off the merchandise; all ten pleaded guilty.

Another operation of organized crime is illustrated in a case featuring John Lombardozzi and Michael Scandifia, reputed members of the cosa nostra. Falsely claiming to be a Teamster Union official Scandifia, together with Lombardozzi, obtained $88,000 worth of diamonds on memorandum from Kaplan Jewelers in Manhattan by representing that other union officials were interested in purchasing the jewels. After complaint was made to the authorities some weeks later, investigation disclosed that the stones had been sold for $56,000 to a jewelry concern across the street from Kaplan's two or three days after the consignment. Although the owner of this jewelry store told the police that the $56,000 was just a deposit, other information suggested that it was not.

The culprits being identified as Scandifia and Lombardozzi, a court-ordered eavesdrop was installed in Scandifia's garage in Brooklyn, a meeting place for cosa nostra members. The installation overheard the two men and others discuss the jewerly fraud case, indicating the intent to defraud. Beyond this, evidence was obtained relating to other crimes which would not otherwise have been unearthed. Scandifia was overheard plotting with one Leonard Grossman, a neighborhood police officer, to murder a man who had given information to the federal authorities. Scandifia asked Grossman to obtain dum-dum bullets for two pistols, and gave the policeman the guns. A search warrant issued on the basis of this information produced the weapons from Grossman's car. Other conversations overheard in that garage resulted in eighty arrests for such crimes as murder of a gang member, conspiracy to commit murder, hijacking, extortion, assault, racial discrimination in the construction industry, criminally receiving stolen goods, and larceny by false pretenses by "bust-out" operations. Several convictions have been obtained to date; many indictments are still pending in New York and Kings Counties.

Labor racketeering provides another fertile field for gangland tactics. In *People* v. *Habel, et al.* [18 N.Y.2d 148 (1966)], five defendants were charged with conspiring to assault and threaten others, to destroy key telephone company installations, and to wiretap illegally. This case arose from an attempt by the Teamster Union (amicus to petitioner herein) to oust the Communications Workers of America as the labor representative of the New York Telephone Company employees. Unknown to the members

of the Communications Workers Union, Habel and other officers of the C.W.A. were in league with the Teamsters, conspiring together to accomplish the change in representation. Expecting rank and file opposition to their betrayal, the defendants planned to strengthen their arguments by intimidating the opposition with threats and physical beatings. The telephone company's compliance was to be assured by dynamiting key telephone installations.

Kenneth Burkhard, a C.W.A. shop steward, was therefore employed as a "front man," and directed to hire the "strong arm" men who would brutalize the opposition leaders and blow up the telephone installations. Fortunately, Burkhard's activities came to the attention of the District Attorney's Office, and undercover detectives worked themselves into his confidence. They were given the "contracts" to assault designated victims, and supplied Burkhard with the dynamite. Although paid for, the beatings were, of course, faked, and the explosive was specially designed to react like a wet firecraker when ignited.

The undercover agents, however, were never able to approach the persons directing the conspiracy, nor to obtain much more than hearsay evidence implicating them. Eavesdropping warrants were therefore issued by the court, authorizing electronic probes into Habel's office and Teamster Union headquarters. The plans concocted in furtherance of the conspiracy were thereby detected, resulting in the indictment and conviction of the key men in the operation, whose acts were confined to plotting in the privacy of their offices and issuing orders to subordinates.

Eavesdropping devices have been occasionally used to prove non-racket connected crimes. Significant among these is the conviction of Richard Robles.

In August, 1963, Janice Wylie and her roommate were savagely murdered in their east side apartment. After an intensive investigation lasting eight months, the murderer had not been caught. Then, a young man of sub-normal intelligence, James Whitmore, was arrested and confessed to the killings. Conducting its own investigation, the New York County District Attorney's Office discovered that the confession was untrue, Whitmore was innocent, and the killer was still at large.

In October, 1964, a drug addict named Delaney was arrested for murdering a drug pusher. Although the evidence showed that the act was done in self-defense, Delaney, worried that he might nevertheless be indicted, asked for consideration in return for identifying the murderer of Janice Wylie and her roommate. He told the police that Richard Robles, a friend of Delaney and his wife, had come to his apartment shortly after the crime to change his blood-soaked clothes and take a shot of heroin. Robles had told Delaney that he had committed the murders. Delaney's wife told the authorities that Robles has visited her apartment on several occasions and discussed the homicide; he had also indicated a desire to discuss the matter with Mr. Delaney when he returned to the apartment upon the expiration of a voluntary civil commitment. An eavesdropping device was secretly installed in Delaney's apartment pursuant to court order, and revealed that Delaney was telling the truth. Although Delaney subsequently discovered the

microphone, he allowed it to remain, and further admissions of guilt by Robles were recorded, thus corroborating the account of an otherwise weak witness with a seemingly strong motive to lie.

Without belaboring the point with more examples, suffice it to say that where eavesdrops are employed by law enforcement, not only does probable cause exist to support the order, but a desperate need in the community demands the response of responsible authority. The results have been impressive: in the five years between 1962 and 1966 inclusive, eavesdropping in New York County has led to eighty-seven convictions and fifty-three indictments. Of these, sixty-four convictions and thirty indictments involved organized crimes; four convictions and twelve indictments involved corruption in public office.

These figures rebut the seemingly reasonable conjecture that those who are deeply or regularly engaged in criminal enterprise will be ever on guard against electronic surveillance and therefore render eavesdropping an unproductive, as well as costly and intrusive technique. And other sources corroborate the interesting phenomenon of caution thrown to the winds. Testifying before the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary, Samuel Dash observed:

> "Strangely enough, although many of these people began conversations with, 'Be careful, the phone is tapped,' or 'Don't say anything,' within a minute or two the kitchen sink comes in. Apparently, they have not been able to use * * * codes. They do try it sometimes * * * but very often the people who participate

in these types of crimes are not very intelligent. They forget the code. They can't understand and after a while they give the whole thing up and talk as freely as they can'' [1959 Hearings, 5th Cong., 2d Sess., pt. 3, pp. 513-14].

The report of the President's Crime Commission makes a similar observation:

> ''Members of the underworld, who have legitimate reason to fear that their meeting might be bugged or their telephones tapped, have continued to meet and to make relatively free use of the telephones—for communication is essential to the operation of any business enterprise'' [The President's Report, p. 201].

POINT III

Probable cause existed to authorize the eavesdrop orders [answering petitioner's Point II, pp. 65-74].

The tape recordings introduced at trial were obtained by means of an electronic eavesdropping device, installed pursuant to court order in the office of Harry Steinman,* a co-conspirator of the defendant under both counts of the indictment. There are, however, two separate orders for two separate eavesdropping installations involved in the present case (Exh. 1, R. 680 and Exh. 2, R. 684). The first in point of time authorized an electronic search of the law office of Harry Neyer** and was based upon the affidavits of Assistant District Attorneys McKenna and Scotti (R. 681-2, R. 683). The second order allowed the search of

* Harry Steinman was subsequently indicted for perjury.

** Harry Neyer was subsequently indicted for bribery and conspiracy to bribe.

Steinman's business office, and was based upon affidavits of Assistant District Attorneys Goldstein and Scotti (R. 685-7, R. 688). While the Steinman affidavits incorporated information obtained from the Neyer eavesdrop, the only eavesdropping evidence introduced at the trial was obtained in the electronic search of Steinman's office. Probable cause for this search was derived in part from the earlier Neyer eavesdrop.

Before trial, a hearing was held affording the defendant an opportunity to challenge all the eavesdrop evidence (R. 21-63). His motion to exclude the evidence was denied. The petitioner here renews his argument that the eavesdrop orders were not based upon probable cause. He is, however, mistaken.

The development of probable cause

Prior to the first application for an eavesdrop order, a Mr. Ralph Pansini came to the District Attorney's Office of New York County with a complaint against the State Liquor Authority. Pansini was at that time attempting to procure a liquor license for a store in the midtown area of Manhattan (R. 26), and agents of the S.L.A. had raided his bar and grill and seized his books and records. Pansini felt that the raid was in retaliation for his refusal to pay a bribe to the S.L.A. two years before, when he had promised to pay in return for a license (R. 52). Files of the District Attorney's Office disclosed numerous other complaints in which prospective licensees had been forced to bribe the liquor authority to obtain licenses (R. 53).

Equipped with a portable miniature recording device, Pansini was then sent to talk with Albert Klapper,* ostensibly an attorney in the office of Martin Epstein, the S.L.A. Commissioner.** Klapper sent him to see Harry Neyer about his prospective application for a liquor license (R. 24-6). The conversations with Klapper and Neyer were secretly recorded by the Minifon, worn by Pansini (R. 25). Although these tapes, marked for identification, were not put in evidence, the prosecutor, Mr. McKenna, described their contents to the court at the hearing. As he revealed them, these discussions acquainted Pansini with the corrupt system prevailing in the State Liquor Authority. Klapper told Pansini that he does not usually talk with the applicants; "he invariably deals with attorneys only; that Mr. Pansini is required to go through attorneys before he can obtain his liquor license in the fashion they are discussing" (R. 25). To discuss the matter with Commissioner Epstein would be "out of the question; that Mr. Epstein doesn't want to even know Mr. Pansini's name; he doesn't even want to know what he looks like or even meet him; that he must deal only through an attorney and through himself" (R. 25-6). Klapper further told Pansini that the price for the license would be $10,000, and the attorney he must use would be Harry Neyer, a former employee of the S.L.A. (R. 25-6, R. 682). Neyer himself acknowledged his awareness of the system and willingness to serve. He told Pansini that he had previously worked with Klapper and that he is "quite well aware of the going rate to get a liquor license downtown" (R. 26). Thus

* Klapper pleaded guilty to conspiring to bribe a public official on March 9, 1967.

** Epstein was indicted for tax evasion and taking unlawful fees.

Neyer was placed in the center of the conspiracy to bribe a public official by his own words and those of a confederate. Accordingly, probable cause existsed to believe that evidence of bribery would be uncovered by monitoring Neyer's office, the place from which he conducted his part in the criminal scheme.

The expectations of the authorities, moreover, were not disappointed, for the electronic installation soon brought to light other conspiracies and other conspirators. One of these involved revocation proceedings against a raided dance hall known as the Palladium (R. 27). A Mr. Howard Mauro had come to Neyer to try to insure retention of the license and defeat of the proceedings. Neyer told the licensee that "it is going to be difficult; that the District Attorney's Office will be watching this particular matter and it is probably going to cost him in the area of five figures" (R. 27). Later, referring to the matter in a phone conversation, Neyer remarked that "this is going to be a big one," and mentioned the cost as $30,000. Neyer also telephoned Mauro and told him that "it is really going to cost him to get that liquor license even higher than he initially told him" (R. 28). Neyer was then visited by Harry Steinman, a prospective liquor license applicant and a night club owner. Steinman agreed to pay to Neyer the $30,000 to secure the defeat of the proceedings against the Palladium (R. 28, R. 686).

In the meantime, Frank Jacklone, attempting to obtain a liquor license for the Tenement Club, met with Harry Steinman in Steinman's office on two occasions in May, 1962 (R. 210-12). At the first meeting, Steinman and Jack-

lone discussed getting back the "legal papers" and $10,000 which Jacklone had previously given to another attorney named Nat Roth. They arranged to meet at Roth's office to obtain the "papers" and then to turn them over to Harry Neyer (R. 220). The subject of the conversation at the second meeting was the same, except that the place for recovery and repayment of the money was apparently changed to Steinman's office (R. 221):

> "Q. Can you tell us what the conversation was between you and Harry Steinman at this second meeting?
>
> * * *
>
> "A. [Jacklone] It's—we were talking about making arrangements with Nat Roth to get the money back, which is, and where we should meet to get the money back; so we made arrangements to meet in his office and Nat Roth to meet at his office to give us the money."

After a second meeting, Steinman brought Jacklone to the wired office of Harry Neyer where the arrangements were discussed, Neyer promising to follow Jacklone's application through the State Liquor Authority (R. 220-2). Thus it was learned that "conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman" (R. 686).

At this point, Steinman was incontrovertibly implicating in the center of the conspiracy. Probable cause clearly established reason to believe that evidence of the conspiracy to bribe public officials would be uncovered by an electronic search of his office.

The petitioner, however, notes that some of this information was not specifically set forth in the affidavits submitted to obtain the orders although he does not, and of course cannot contest that the facts were known to the authorities, since the tapes and transcripts of Pansini's conversations with Klapper and Neyer, and the conversations recorded in Neyer's office were all marked for identification at the hearing. Instead, he argues that no showing was made on the record that the issuing justice was ever apprised of the facts in the possession of the District Attorney's Office. However, the record reveals that a showing was made at the hearing that the issuing authority was apprised of the facts. The prosecutor specifically stated that "the District Attorney of New York County obtained the evidence that went to a Justice of the Supreme Court of the State of New York. We presented our evidence to that judge; we told him what we were looking for; we told him the conversations we were attempting to obtain and we related to him the evidence" (R. 56).

In any event, petitioner's challenge to the proceedings before the issuing judge are refuted by the same factors which repel his attack upon the support for both the Neyer and Steinman orders: in the case of the Neyer order, because he is without standing; in the case of the Steinman order, because the affidavit is sufficient on its face.

The first (Neyer) eavesdrop

The petitioner's assault upon the sufficiency of the affidavit supporting the order for eavesdropping on Harry Neyer's office is doomed without regard to its merits, for he is without standing to launch it.

Since Berger was not present during the overheard conversations and had no interest in the premises wired, there could have been no invasion of his constitutional rights by the installation. Nor did he acquire standing to contest this order because resulting evidence was subsequently used to support an order which he did have standing to challenge. Since material seized in violation of the constitutional rights of one person can not be attacked when used in evidence against another, *a fortiori* it is immune when employed as the basis for an order in the nature of a search warrant.

Since eavesdropping, as a search for and seizure of oral evidence, is controlled by the Fourth Amendment to the Constitution, authorities dealing with physical evidence, and the acquisition and suppression thereof, are directly applicable here. And the petitioner's lack of standing to challenge the legality of the means by which evidence was obtained from Neyer's office is the inescapable conclusion from the leading decisions of this Court. *Jones* v. *United States* [362 U. S. 257 (1960)] held that only the party aggrieved by an allegedly illegal search has standing to challenge the use of its product. The person aggrieved, the decision made clear, was the person whose security was breached by the search, not the person against whom the evidence may eventually be used.

More recently, the doctrine was reaffirmed in the famous decision of *Wong Sun* v. *United States* [371 U. S. 471 (1963)], a case whose facts are directly relevant to the present issue. In *Wong Sun* an illegal entry into the premises of one Toy led to admissions incriminating Yee.

In Yee's premises, the authorities uncovered narcotics which Yee said were given to him by Wong Sun. The evidence found in Yee's premises, the Court decided, could not be used against Toy, the discovery of the drug stemming from the initial illegality involving Toy. But significantly, this Court held that the evidence was nonetheless admissible against Wong Sun, since he had no standing to challenge the seizure, his personal rights not being violated [371 U. S. at 491-2]. Yee's position was not adjudicated. Thus, even assuming *arguendo* that the search of Neyer's premises were unlawful, Berger, who was not present and had no interest in that premises, had no more standing to exclude the evidence than did Wong Sun; both were beyond the "primary taint" [also see, *Goldstein* v. *United States,* 316 U. S. 114 (1942)].

Attempting to circumvent Berger's lack of standing, amicus argues that the search of Neyer's office was unlawful and the information leading to the Steinman eavesdrop was the "fruit of the poisoned tree," citing *Silverthorne Lumber Co.* v. *United States* [251 U. S. 385 (1920)]. However, the *Silverthorne* doctrine does not undercut the standing rule; it is consistent with it. In that case, an illegal search led to the seizure of Silverthorne Lumber Company books and records. The District Court ordered the return of the documents, but the government, having photographed and copied them, used the information to frame a new indictment and issue subpoenas to the the company and its owner. Refusing to obey the subpoenas, Frederick Silverthorne and his lumber company were fined for contempt. Clearly, both had standing to challenge the initial govern-

ment intrusion which supplied the information for the subpoena, the defendants' own premises having been invaded. Had a similar subpoena based on the same information been directed to another who had no interest in the lumber company's premises, he would be without standing to assert the Fourth Amendment claim [*United States* v. *Bozza,* 365 F.2d 206, 223 (2d Cir. 1966)].

Moreover, standing to challenge the validity of the Steinman order does not confer standing to attack the sufficiency of the Neyer affidavit. While the facts leading to a determination of probable cause in the Steinman order are indeed subject to petitioner's inquiry, the actual sufficiency of the Neyer affidavit is not. Since the cause for the Steinman order extends back and includes facts leading to the Neyer order, his challenge necessarily calls for review of the entire investigation. But the question: Which of these facts were included in papers seeking an eavesdrop order on Neyer? is outside the proper area of the petitioner's challenge. He must restrict his attack to the order which, allegedly, infringed upon his own right to security: the Steinman order. And thus limited, his attack fails, for the affidavit supporting the order to eavesdrop on Steinman's office is adequate on its face to spell out the requisite probable cause.

The second (Steinman) eavesdrop

Even assuming that probable cause were not spelled out in the Neyer affidavit, the investigators nevertheless knew sufficient facts, and set them forth with a high de-

gree of specificity in the affidavit supporting the Steinman order (R. 685-7). For in it, the corrupt system employed by the conspirators was spelled out, the evidence showing that large sums of money were required to obtain a liquor license, and that certain attorneys served as conduits, transferring the bribes from the applicants to the public officials. Neyer was described as one of these attorneys. Steinman was shown to have agreed to pay a $30,000 bribe for a license, and meetings were alleged to occur in his office pertaining to the scheme. Thus, the Steinman affidavit included facts of a particular conspiracy, naming the parties to it, the purpose of it, and the method by which it operated. Therefore, besides the evidence orally presented to the judge (R. 56), the court was informed in affidavit form of "some of the underlying circumstances" of the sworn conclusions [*Aguilar* v. *Texas,* 378 U. S. 108 (1964)]. And in contrast to *Aguilar,* where the source and reasons for reliability of the informant and his information were not elucidated, the present order explicitly named an eminently reliable source, for the conspirators had implicated themselves by words spoken in the course of their crime.

Indeed, warrants based upon weaker affidavits than this one have been many times upheld, courts noting that the information need be only "reasonably trustworthy", and "warrant a man of reasonable caution" to believe that evidence of crime will be uncovered [*Carroll* v. *United States,* 267 U. S. 132, 162 (1925)]. For example, in *Evans* v. *United States* [242 F. 2d 534, (6th Cir. 1957), cert. den. 353 U. S. 976 (1957)], an unknown man entered the police station, gave his name, and volunteered information that

the appellant had contraband in his bedroom. No reason was alleged for this belief in the sworn affidavit he subsequently signed, but the warrant that issued was sustained, probable cause being established [see also, *United States* v. *Eisner*, 297 F. 2d 595 (6th Cir. 1962), cert. den. 369 U. S. 859 (1962); *United States* v. *Meeks*, 313 F. 2d 464 (6th Cir. 1963); *United States* v. *Ramirez*, 279 F. 2d 712 (2d Cir. 1960)]. In *United States* v. *Trujillo* [191 F. 2d 853 (7th Cir. 1951)], an undercover agent visited the appellant's apartment, seeking to buy drugs. The appellant admitted that he was engaged in selling marihuana, but declined to deal with the agent since he had not been personally introduced to him and since his supplier had recently been arrested, cutting off his source of drugs. A warrant based solely on this information was upheld, the court indicating that probable cause was established from the admissions of the appellant describing his business.

In sum, the affidavit herein, framed in 1962, when the procedures for obtaining eavesdrop orders were still young and unrefined, nonetheless set forth a sufficiently full array of facts to give rise to a reasonable belief that evidence of crime would be brought to light by eletronic surveillance. Deficiencies of amplitude or explicitness there may well have been in this affidavit, but they can not soften the kernal of manifestly reliable information from a disclosed source which justified the expectation of particularized discussions at a designated location. Accordingly, the order here in question, having resulted from a conscientious, good faith effort by the prosecutor to obtain prior court sanction for urgently required perception in an important investigation, should not fall, and the law

of New York, under which it was issued, should not be banished from the toolshed of law enforcement.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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New York County

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Of Counsel

April, 1967

BRIEF AMICUS CURIAE

No. 615

APR 8 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RALPH BERGER, *Petitioner*

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*

On Writ of Certiorari to the Court of Appeals of New York

BRIEF OF AMICI CURIAE URGING AFFIRMATION
On Behalf of

Elliot L. Richardson, Attorney General, Commonwealth of Massachusetts;

Robert Y. Thornton, Attorney General, State of Oregon;

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Robert Y. Thornton, Attorney General, State of Oregon;

National District Attorneys' Association.

INTEREST OF AMICI CURIAE [1]

This brief is submitted on behalf of the above Attorneys General and the National District Attorneys' Association.

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[1] Pursuant to Rule 42, ¶ 2, there has been filed with the clerk written permissions by the parties for the filing of this brief.

It was prepared under the auspicies of the National District Attorneys' Association, a non-profit corporation founded in 1950, which has as its chief purpose the improvement of the administration of justice in the United States and numbers among its members 1,500 lawyers involved in the administration of justice in the fifty states.

This case, raising as it does broad issues of privacy and justice, necessarily will have implications for the administration of justice throughout the United States. These Amici, therefore, seek to draw this Court's attention to these broad questions.

SUMMARY STATEMENT OF THE CASE

In January of 1962, Ralph Panzini came to the office of the District Attorney of New York County (R. 52).[2] He complained of official oppression by the State Liquor Authority (R. 52). The files of the District Attorney's Office indicated that others had been forced to pay for liquor licenses (R. 53). Mr. Panzini was then equipped with a Minifon device and conversations were recorded between Mr. Panzini and Albert Klapper (R. 24-26), a clerk (R. 22) in the law office of Martin P. Epstein, a commissioner of the Authority (R. 26), and Harry Neyer (R. 24-26), an attorney (R. 22) and former employee of the Authority (R. 682).

Based on these recordings (R. 26), which detailed an extensive scheme of corruption (R. 25-26), an affidavit (R. 681-82) was executed on April 5, 1962, by Jeremiah B. McKenna, an assistant district attorney, and an electronic surveillance

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[2] "R" refers to record. There was no adversary hearing below on the circumstances surrounding the issuance of the electronic surveillance orders now at issue. Instead, they were given to the court by the assistant district attorney without objection by petitioner's counsel (R. 22-31, 52-54). The motion to suppress was apparently decided on the basis of the face of the affidavits supporting the orders. (R. 47).

order (R. 680) was obtained under Section 813-a of the New York Code of Criminal Procedure for surveillance of the offices of Mr. Neyer. Based on the recordings there obtained (R. 28), which further detailed the scheme (R. 26-27), and other visual observations (R. 28), an affidavit (R. 685-87) was executed on June 11, 1962, by David A. Goldstein, an assistant district attorney, and another electronic surveillance order (R. 684) was obtained, this time for the offices of Mr. Harry Steinman. Both applications for orders had the approval of the Chief of the Rackets Bureau of the District Attorney's Office. (R. 683, 688).

As a direct result (R. 47) of the recordings obtained under these electronic surveillance orders, Petitioner was indicted (R. 2-9) and convicted under Section 580 of the New York Penal Code for conspiracy to bribe in violation of Section 378 of the New York Penal Code. He was sentenced to one year on each of two counts (R. 1).

The New York Court of Appeals affirmed the conviction (R. 691) without an opinion on July 7, 1966, and this Court granted certiorari on December 5, 1966 (R. 692).

Restated, the questions presented are (R. 692):

> (1) May New York's court order system of permissive electronic surveillance be squared with the requirement under the Fourth Amendment that searches and seizures be reasonable and under Fifth Amendment that self-incrimination not be compelled?
>
> (2) Were the electronic surveillance orders in this case issued on an adequate showing of probable cause?

The attention of this Amicus brief will be directed solely to question (1), since it alone raises broad issues of privacy and justice throughout the United States.

STATUTES

This case directly puts in issue the constitutionality of the following court order electronic surveillance statute:

NEW YORK

CODE OF CRIMINAL PROCEDURE (1958)

§ 813-a. *Ex parte order for eavesdropping*

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witnesses he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed or issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

The Amici wish also to direct the attention of this Court to the following four court order electronic surveillance statutes, which are indirectly put in issue by this case:

MASSACHUSETTS

MASSACHUSETTS GENERAL LAWS ANNOTATED (1954)

CHAP. 272

§ 99. *Eavesdropping; use of devices; wire tapping; court's order*

Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.

Such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Said orders shall describe or identify (1) the purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known; (3) if telephone communications are to be so intercepted the telephone line if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted.

In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce, for the purpose of satisfying himself of the existence of reasonable grounds to believe that evidence of crime may be thus obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. And such order shall be effective for the time specified therein, but not for a period of more than three months, unless extended or renewed by the justice who signed and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for such interception or directing such overhearing or interception of the telephone communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained personally by the judge or justice issuing the same. In case of emergency and when no such justice is available, the attorney general or the district attorney for the district may issue such order, but within seventy-two hours thereafter the said attorney general or district attorney upon oath or affirmation setting forth all the facts, shall apply to a justice of the supreme judicial or superior court for a court order to issue validating the acts of said attorney general or district attorney. If the court refuses, after hearing, to validate such prior order of the attorney general or district attorney, said prior order shall cease to be effective, and no further action thereunder may be taken.

MARYLAND

Annotated Code of Maryland (1957)

Article 27—Electronic Devices

§ 125A. *Use to overhear or record private conversation*

(a) *Use without knowledge or consent prohibited.* It is unlawful for any person in this State to use any electronic device or other device or equipment of any

type whatsoever in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person.

(b) *Prevention or crime or apprehension of criminal—Petition for ex parte order authorizing use.* However, if it shall appear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or Baltimore City the evidence upon which the said law enforcement officer bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a formal ex parte petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any such prior application has been

made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same—Issuance of order: duration; disposition.* The Judge of the circuit court of the county or of the Supreme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective for the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex parte order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court.

Article 35—Wire Tapping

§ 94. *Ex parte order for interception of telephonic and telegraphic communications*

(a) An ex parte order for the interception of telephonic and telegraphic communications may be issued by any judge of a circuit court or of the Supreme Bench of Baltimore City upon the verified application of the Attorney General or any State's attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(1) There are reasonable grounds to believe that a crime has been committed or is about to be committed.

(2) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(3) There are no other means readily available for obtaining such information.

(b) Where statements are solely upon the information and belief of the applicant, the grounds for the belief must be given.

(c) The applicant must state whether any prior application has been made to obtain telephonic and telegraphic communications on the same instrument or for the same person and if such prior application exists the applicant shall disclose the current status thereof.

(d) The application and any order issued under this section shall identify as fully as possible the particular telephone or telegraph line from which the information is to be obtained and the purpose thereof.

(e) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(f) Orders issued under this section shall not be effective for a period longer than thirty (30) days, after which period the court which issued the order may upon application of the officer who secured the original order, by application, in its discretion, renew or continue the order for an additional period not to exceed thirty (30) days.

NEVADA

Nevada Revised Statutes (1963)

Interception and Disclosure of Wire and Radio Communications, Private Conversations

200.660 *Court order for interception; Contents of application; effective period; renewals.*

1. An ex parte order for the interception of wire or radio communications or private conversations may be issued by the judge of a district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnaping, extortion, bribery or crime endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and

(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facilities on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Order issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

OREGON

Oregon Revised Statutes (1963)

Interception of Communications

141.720. *Order for interception of telecommunications, radio communications or conversations.* (1) An ex parte order for the interception of telecommunications, radio communications or conversations, as defined in OSR 165.535, may be issued by any judge of a circuit or district court upon verified application of a district attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information.

(2) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain telecommunications, radio communications or conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

(4) The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof.

(5) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

SUMMARY OF THE ARGUMENT

Much depends on what approach is taken. In arguments over constitutional procedure, too often an unnecessary dichotomy is set up between privacy and justice, while in reality both ends must be served in the overall system. Analysis of the constitutionality of court order electronic surveillance must be made in the context of organized crime and corruption as it exist today. We have always had organized crime and corruption, but its impact previously differed because we were earlier a small, sparsely populated, homogeneous farming community, while today we are large, densely populated, heterogeneous, industrialized and urbanized. There has grown up in our society, moreover, highly organized, structured and formalized groups of criminal cartels, whose existence today transcends the crime known yesterday, for which our criminal laws and procedures were primarily designed. They have become more than mere groups of criminals; they have become businesses and governments within our society, presenting unique challenges to the administration of justice. They are active in professional gambling, the importation and distribution of narcotics, and loan sharking, each an offense which today is predatory in character, and which seriously affects the quality of our urban life. Moreover, the groups have not confined their activities to traditional criminal endeavors, but have begun to subvert large spheres of legitimate busi-

ness and union activity, thus undermining our economic institutions. And most importantly, they have everywhere established corrupt alliances with the processes of our democratic society, the police, the prosecutor, the court, and the legislature, making the possibility of a free and open society more form than substance. Finally, by their success in achieving power, wealth, and freedom from legal accountability, they are seriously calling into question the viability of our highest held values and are proving to our young that crime, rightly organized, does in fact pay well indeed.

Scientific judgments about the effectiveness of various alternative courses of action in the administration of justice are, of course, difficult to make. Empirical data available to some degree in other areas is non-existent here and unlikely to become available in the foreseeable future. Yet the judgment of knowledgeable men based on extensive experience is that without the use of electronic surveillance techniques, criminal sanctions will never be brought to bear consistently on the various levels of organized crime and its links with legitimate society through political corruption. Thus, the criminal law will have no role to play in dealing with this pressing social problem. Due process requires evidence. Here that means witnesses, since the groups do not keep books and records available for police inspection. To date law enforcement success has been more an accident of hard work than a proof of the vulnerability of its object. Insiders are kept quiet by an ideology of silence underwritten by a fear, quite realistic, that death comes to he who talks. Citizen witnesses have been and are constantly bribed, threatened or murdered. Police witnesses do not exist, for the crimes and activities of the groups are not public. Corruption, too, plays a factor. It is necessary, therefore, to develop witnesses or secure substitutes not subject to elimination by fear or favor. Electronic surveillance techniques hold the only practical hope. This is the conclusion of both the Privy Councillors who

studied the use of wiretapping in England and the President's Commission on Law Enforcement and the Administration of Justice who examined wiretapping and bugging in this country.

While there are serious constitutional objections to the use of these techniques, none is insuperable. Unrestrained electronic surveillance by private and public ears poses a serious threat to free communication. But limited, court order law enforcement use cannot be said to have an indirect impact on free speech disproportionate to its direct benefit to other values. The real question is instead the reasonableness of the use of these techniques under our traditions stemming from the Fourth Amendment. Court order electronic surveillance is limited as to person, place, time, justification, communication, and purpose. As such, it squares with our traditions. It offers, too, the only realistic hope of channeling law enforcement activity into legitimate use of these techniques, thus authorizing their use while curtailing their abuse. No indiscriminate search and seizure is authorized. Search and seizure of oral communications in no way substantially differs from search and seizure of written documents now constitutionally permitted. Court order electronic surveillance does not involve a general search and seizure. Seizure takes place with appropriation for and use as evidence not examination or recording. The existing rule that evidence as such may not be seized, moreover, is an anachronism which should be rejected outright or here held not applicable. A rule without a reason is without justification for its continuance. While notice is normally a prerequisite for search, it has never been such a requirement that it would defeat the right, on a proper showing, to search itself. Where evidence would be destroyed, or, as here, not obtained, a legitimate exception ought to exist. The requirement of notice is met by the pre-use showing required before the evidence may be used at trial. Because no compulsion is involved, no question of compulsory self-incrimination under the

Fifth Amendment is presented. It has application, if at all, only after a violation of the Fourth is shown.

For these reasons, the basic constitutionality of the New York scheme of court order limited electronic surveillance should, we respectfully suggest, be upheld, and to this degree, the judgment of the Court of Appeals of New York affirmed.

ARGUMENT

I

ORGANIZED CRIME AND CORRUPTION TODAY POSES SPECIAL DANGERS TO VALUES HELD HIGH BY OUR SOCIETY AND A UNIQUE CHALLENGE TO LAW ENFORCEMENT.

A. The Constitutional Questions Raised by This Case Must Be Resolved by a Process of Balancing.

Mr. Justice Frankfurter once observed of journeys in the law that often "where one comes out on a case depends on where one goes in." *United States* v. *Rabinowitz,* 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting). So it is in the examination of the constitutionality of electronic surveillance techniques.[3] The attitudes and assumptions

[3] For the purposes of this brief, the phrase "electronic surveillance" refers to the overhearing or recording without the consent of one of the parties of any communication uttered within or projected from and to a constitutionally protected area over constitutionally protected means. Thus, it includes "wiretapping" and "bugging." It does not include "recording" with consent of one or more parties, cf. *Rathbun* v. *United States,* 355 U.S. 107 (1957) (Wire communication); *Lopez* v. *United States,* 373 U.S. 427 (1963) (Oral communication), or an overhearing which takes place in a public area. Cf. *Lopez* v. *United States,* 373 U.S. at 466 n. 12 (Brennan, J., in dissent). *Compare, Linnell* v. *Linnell,* 143 N.E. 813 (Mass. 1924) (Husband and wife in railroad station not private), *with, Freeman* v. *Freeman,* 130 N.E. 220 (Mass. 1921) (Similar conversation in street not overheard held private). We thus see no constitutional difference between the invasion of privacy involved in wiretapping and bugging. We shall draw no distinction, therefore, in this brief between these two electronic surveillance techniques.

brought to the controversy shape, color and determine the resolutions proposed.[4] At one extreme, some seem to believe that the social order depends almost exclusively on punishment by law, and requires the capture, conviction and severe treatment of as many culprits as possible. To these people, arguments upholding the power of those who administer the penal system, therefore, naturally strike a responsive chord. Privacy may be important, but justice is always paramount. At the other extreme, some seem to think that all criminal law is simply crudely disguised vengeance, that incarceration is a pointless cruelty deterring or reforming no one, embittering its victims more than it protects society and inflicting less pain on the guilty than on innocent dependents. To these people, arguments upholding the power of those who administer the system always go too far and, if sustained, make possible unwarranted intrusions into the life of the individual. Privacy is paramount; justice counts for little if anything. Between these two untenable extremes, however, there is a middle course, which commends itself to moderates. A system of penal law must maintain both individual privacy and justice. Neither value must be dogmatically accorded priority. Each issue in the system calls for a careful and informed judgment weighing both values. Most of law, like most of life, is a trade-off, a compromise of absolutes, always to be pragmatically accessed.[5] The problem is as Judge Learned Hand put it: there is "no escape in each situation from balancing the conflicting interests at stake with as

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[4] Cf. Schwartz, "On Current Proposals to Legalize Wiretapping," 103 *U. of P. L. Rev.* 157, 157-59 (1954).

[5] Riesman, "The Present State of Civil Liberty Theory," 6 *J. of Pol.* 323, 334 (1944) observed: "If we deal in absolutes, the old rules hold of course—or are utterly abandoned in desperation." Thus, those who see and support civil liberties' positions in terms of black and white in the long run are an equal danger to true freedom with those who always support the contrary position.

detached a temper as we can achieve." Hand, *The Spirit of Liberty,* 179 (Dillard 3rd ed. 1960).[6]

B. The Constitutional Questions Must Be Placed in the Larger Context of Organized Crime and Corruption Today.

All too often constitutional controversies tend to become debates between contending ideologies. Rhetoric supplants reason; citation of ancient authority substitutes for analysis of present conditions. Yet constitutional provisions are, as Mr. Justice Goldberg reminded us, "practical and not abstract." *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965). In this, he echoes Chief Justice Marshall's often quoted dictum: "We must never forget that it is a constitution we are expounding." *McCullock* v. *Maryland,* 17 U.S. (4 Wheat) 316, 407 (1819). We learned in the first half of this century of the relevancy of materials outside of the lawbooks in the area of economic freedoms. Cf. *Muller* v. *Oregon,* 208 U.S. 412 (1908). *But see, Pointer* v. *Texas,* 380 U.S. 400, 413 (1965) (Goldberg, J. concurring). Thus, we suggest, it is necessary to examine the use of electronic surveillance techniques in the context of the challenge that modern organized crime and corruption present to the administration of justice and the values of our society. "For that which taken singly and by itself may appear to be wrong, when considered with relation to other things may be," as Burke says,[7] "perfectly right—or at least such as ought to be patiently endured as the means of preventing something that is worse."

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[6] Hand echoes Pound, *Criminal Justice in the American City* 18 (1922): the problem in criminal law is "one of compromise; of balancing conflicting interests and securing as much as may be with the least sacrifice of other interests."

[7] Stanlis, *Edmund Burke: Selected Writings and Speeches* 318 (1963).

1. Organized crime has deep roots in our culture and history.

The roots of organized crime run deep in our culture[8] and our history.[9] Our early pirates were among the first Americans to engage in organized crime. Our revolutionary period produced its smugglers. The nineteenth century, too, produced a variety of gangs: the city mobs of New York and San Francisco, arising out of ethnic friction, poverty and the crude politics of the early metropolises; the highwaymen, gamblers and slave snatchers of the old West, such as John Murrell and his people along the Natchez trace; the river and port pirates such as Jean Lafitte in New Orleans. The end of the century produced frontier gangs, who, often as not, were either mercenaries or parties in the multiple struggles over land, cattle, grazing fields, mining and timber properties. The Great War of this century itself produced the James boys, the Daltons, the Youngers and others.

Yet all of this had its impact in an America of yesterday.[10] Our population was then small, only four million

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[8] See generally, Tyler, "The Roots of Organized Crime," 8 *Crime and Delinquency* 325-38 (1962).

[9] See generally, Tyler, "An Interdisciplinary Attack on Organized Crime," 347 *Annals* 104, 107-109 (1963).

[10] On the meaning of the contrast of today and yesterday in the administration of criminal justice, see generally, Pound, *Criminal Justice in the American City* 32-54 (1927). The President's Commission on Law Enforcement and the Administration of Justice noted in their Report: ". . . the American system was not designed with Cosa Nostra type criminal organizations in mind, and it has been notably unsuccessful to date in preventing such organizations from preying on society." *The Challenge of Crime in a Free Society:* A Report by the President's Commission on Law Enforcement and the Administration of Justice, 7 (1967). (Hereinafter cited *President's Report.*)

in 1790; by 1850, only twenty-three million.[11] We were then sparsely settled, only five people per square mile in 1790; by 1850, only eight.[12] Our nation itself was small; in 1790, less than a million square miles; by 1850, less than three million.[13] We lived in rural areas, and we were a stable, largely homogeneous people; and we farmed, largely by hand. In 1790, just over 200,000 of us lived in cities; by 1850, just over 3,500,000.[14] And at that, the cities were small. In 1790, we had no cities over fifty thousand in population; by 1850, only ten.[15]

2. Organized crime and corruption today are compounded by population growth, density, and diversification as well as urbanization and industrialization.

By the beginning of the twentieth century, however, things had begun to change. Our population by 1930 had risen to 123 million.[16] Our national population density was 34 per square mile.[17] We were no longer a small nation. The shift from rural area to city was well past the halfway mark.[18] The early nation of small farmers was fast

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[11] *The Statistical History of the United States from Colonial Times to the Present* 7 (1965). See *President's Report* at 27 for a list of factors that must be taken into account in interpreting crime data. It includes density and size of population and the metropolitan area of which it is a part and the economic status of the people.

[12] *Id.* at 8.

[13] *Ibid.*

[14] *Id.* at 9.

[15] *Id.* at 14.

[16] *The Statistical History of the United States from Colonial Times to the Present* 8 (1965).

[17] *The U.S. Book of Facts, Statistics & Information* 13 (1965). The northeastern part of the United States was, of course, much higher: 210; cities, too, were even much higher: New York—22,000. *Id.* at 13, 20.

[18] *The Statistical History of the United States from Colonial Times to the Present* 9 (1965).

disappearing, and our population was no longer uniform. Those were the years, too, when our nation absorbed wave after wave of immigration.

The late nineteenth and early twentieth century thus saw the rise of the great city-wide gang combinations, usually in alliance with the *nouveaux riches* and the *nouveaux politiques*. The first gangs of the Little Old New York area were Irish. San Francisco in the gold rush days had its Australians. New York in the mid-twenties saw the embarrassment of the Jewish community at the phenomenon of the "Jewish gangster." By the 1930's, however, everywhere the Italian-Sicilians had gained dominance.[19]

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[19] Concern that identification of the ethnic character of the dominant group in organized crime casts unfair reflection on Italian-Americans generally is misplaced. Ralph Salerno, one of the nation's outstanding experts on organized crime, eloquently refuted this idea. When an Italian-American racketeer complained to him, "Why does it have to be one of your own kind that hurts you?"—Salerno answered:

> I'm not your kind and you're not my kind. My manners, morals and mores are not yours. The only thing we have in common is that we both spring from an Italian heritage and culture—and you are the traitor to that heritage and culture which I am proud to be part of.

President's Report at 192-93.

The identification, however, does present real dangers. Finding that the "racketeers" are "foreigners," we run the risk of "escapegoatism." The tendency is to blame the problem on others. The "culture is not only relieved of sin but (it) can indulge itself in an orgy of righteous indignation." Tyler, "The Roots of Organized Crime," 8 *Crime & Delinquency* 325, 334 (1962). The immigrant may have brought the Mafia and the Camorra with him, but to have survived and prospered, both groups must have found fertile soil here. There is more than the mere significance of nomenclature in the change of the name of the group to La Cosa Nostra. *President's Report* at 192. We run the risk, too, of blithely assuming that as soon as the acculturation process has been completed, the

The Italian-Sicilians were the last of the great immigrant groups. Like the others before them, they came seeking hope in a new country, yet with them came two predatory groups: the Mafia of Sicily and the Camorra of Naples.[20] Largely through the efforts of the Italian government in the 1920's and 1930's many of their members found it necessary to seek refuge and victims in a new country.[21] At first, largely during the era of prohibition, these groups warred among themselves and against those who came before them. Like business, industry and finance of America at the turn of the century, however, organized crime had its great consolidator — Charles "Lucky" Luciano.[22] It was Luciano who finally brought the various factions together and through the unique strength of the Italian groups' family-like structure[23] was able to forge the confederation that today is dominant in organized crime everywhere.

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whole mess will disappear. See Bell, "Crime As an American Way of Life," in *The End of Ideology* 127-50 (Collier ed. 2nd rev. 1962). The idea is attractive; it calls for no action on our part; it finds no fault in our present way of life. Unfortunately, it has shown no signs of happening. Finally, the tendency to identify organized crime with the Italian-American makes us blind to the operations of those of other ethnic derivations, operations which are considerable.

[20] For a fascinating contemporary account of these two groups, see Crawford, *II Southern Italy and Sicily and the Rulers of the South* 363-85 (1900).

[21] *The Kefauver Report on Organized Crime* 128 (Didier ed. 1951) (Hereinafter cited *Kefauver Report*).

[22] See generally, *Organized Crime and Illicit Traffic in Narcotics*, S. Rep. No. 72, Committee on Government Operations, United States Senate, 89th Cong., 1st Sess. 11-18 (1965) (Hereinafter cited *Organized Crime Report*).

[23] See generally, Anderson, "From Mafia to Cosa Nostra," 71 *The American J. of Soc.* 302 (1965); *Organized Crime Report* at 7-11.

3. Organized crime today is highly structured and formalized, acquiring an almost impersonal existence.

Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the nation.[24] The wealthiest and most influential operate in New York, New Jersey, Illinois, Florida, Louisiana, Nevada, Michigan and Rhode Island. Estimated overall strength of the core groups is put at 5,000, of which 2,000 are thought to be in the New York area alone.[25] These groups, coupled with their allies and employees, constitute the heart of organized crime in the United States at this time.

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[24] Unless otherwise noted this data on the national scope and internal structure of La Cosa Nostra is taken from the *President's Report* at 192-95. The testimony of Robert F. Kennedy in *Organized Crime and Illicit Traffic in Narcotics*, Hearings before the Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 88th Cong., 1st Sess. 5-35 (1963) contains other valuable information. The testimony of J. Edgar Hoover, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 89th Cong., 2nd Sess. 271-78 (1966) (Hereinafter cited *Hoover*) also contains valuable information. Mr. Hoover's statements there should be contrasted with his position as late as 1962: "No single individual or coalition of racketeers dominates organized crime across the nation. There are, however, loose connections among controlling groups in various areas. . . ." Quoted in Johnson, "Organized Crime: Challenge to the American Legal System," 53 *J. of Cri. L. Crim. & Pol. Sci.* 399, 401 n. 12 (1962) (Hereinafter cited *Johnson*). The difference coincides with an alleged increase in the use of electronic surveillance equipment. See generally, Cipes, "The Wiretap War," *The New Republic*, Dec. 24, 1966. Compare, *Black* v. *United States*, No. 1029, Oct. Term 1965, *Supplemental Memorandum for the United States*. Now the information possessed by the Bureau has been termed "significant." *President's Report* at 199. The Bureau's use of these techniques under Departmental directions should be placed in the context of its impeccable record in other areas of criminal investigative procedures. See generally, *V Justice: 1961 United States Commission on Civil Rights Report.*

[25] *Hoover* at 273.

Each of the 24 groups is known as a "family." Membership varies from 700 down to 20. Most cities have only one family; New York city has five. Family organization is rationally designed with an integrated set of positions geared "to maximize profits" [26] and to protect its members, particularly its leadership, from law enforcement.[27] Like any large corporation, and unlike the criminal gangs of the past, the organization functions regardless of individual personnel changes, and no one individual is indispensable. The killing of Jesse, for example, ended the James gang; the deportation of Luciano merely resulted in the leadership passing to Frank Costello.[28] To destroy an organization with criminal prosecutions, it is thus necessary successfully to attack all levels simultaneously.

The hierarchical structure of the families closely parallels that of Mafia groups that operated for almost a century on the island of Sicily. Each family is headed by a "boss," whose primary functions are order and profit. Beneath each boss is an "underboss." He collects information for the boss; he relays messages to him and passes his instructions to his underlings. On the same level with the underboss is the *consigliere,* who is often an elder member, partially retired, whose judgment is valued. Below him are the *caporegime,* who serve either as buffers between top men and lower level personnel, or as chiefs of operating units. As buffers, they are used to maintain insulation from the investigative procedures of the police. "To maintain their insulation . . ., the leaders . . . avoid direct communication with the workers. All commands, information, complaints and money flow back and forth through" [29] the buffer. The need to be able to intercept or overhear

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[26] *President's Report* at 192.

[27] *Organized Crime Report* at 5-10.

[28] *Id.* at 14.

[29] *President's Report* at 193.

these otherwise inaccessible communications is clear. Below the *caporegime* are the *soldati* or the "button" men. They actually operate the particular illicit enterprise, using as their employees the street level personnel of organized crime. These employees, however, have no insulation from detection by police action. It is they who are most often arrested, for it is they who "take bets, drive trucks, answer telephones, sell narcotics, tend stills, or operate legitimate businesses." [30] And often they are not of Italian extraction. For example, in a major lottery business in a Negro neighborhood in Chicago, the workers were Negro; the bankers, Japanese-Americans; but the operation "was licensed, for a fee, by a family member." [31]

There is a tendency to see organized crime in terms of those groups engaged in gambling, narcotics, loan sharking or other illegal businesses. This is useful since it distinguishes youth gangs, pickpockets and professional criminals generally, which groups are ad hoc There are at least two aspects of high level organized crime, however, that "characterize it as a unique form of criminal activity." [32] Two functional positions in the organized crime group make it substantially different from these other criminal operations: the "enforcer" [33] and the "corruptor." [34] The enforcer has as his duty to maintain organizational integrity by arranging for the maiming and killing of recal-

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[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] See generally, Cressy, "Organized Crime As a Social System," in *Proceedings, First National Symposium on Law Enforcement, Science and Technology* (1967).

[34] See generally, Blakey, "Organized Crime and Corruption Practices," in *Proceedings, First National Symposium on Law Enforcement, Science and Technology* (1967).

citrant members.[35] The corruptor has as his function to establish relations with those public officials and other influential persons whose assistance is necessary to achieve the organization's goals. By the inclusion of these positions, each family becomes not only a business but a government.

The highest ruling body of the 24 families is the "commission." This body serves as a combination legislature, supreme court, board of directors, and arbitration panel. Members look to the commission as the ultimate authority on organizational and jurisdictional disputes. It is composed of the bosses of only the nation's most powerful families, but has authority over all. Its composition has varied from 9 to 12 men. Currently, 9 families are represented; 5 from New York city, 1 each from Philadelphia, Buffalo, Detroit and Chicago. The commission is not a representative or elected body. Members are not equals. Men with long tenure, the heads of large families, those

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[35] J. Edgar Hoover has testified: "I remember one particular case where they kidnaped a man they thought was not to be trusted. They hung him on a butcher's hook for three days and tortured him until he died." *Hoover* at 272. Today, however, most of the "destructive energies of organized crime are no longer dissipated on internal strife; they are concentrated on its outside enemies." *Johnson* at 409. The scope of the violence for which organized crime has been responsible is illustrated by the number of gangland killings in Chicago. Since 1919, there have been over 1,000 such murders. One of the most recent victims was found with a bullet hole in his throat and a dime—the sign of an informer—on his chest. *Chicago Daily News*, Feb. 22, 1967, p. 1, col. 4. Only a few have resulted in arrests. *A Report on Chicago Crime for 1964: Chicago Crime Commission* 43. This should be contrasted with the national statistics; 91% of all murders are cleared through arrest. See, *e.g.*, *Crime in the United States: Uniform Crime Reports, 1965* 19. This is not because the police have not been able to identify the killers; informants have usually within a day or so identified the "hit man" and specified the motive; it has been because "hit men" are professionals who leave no evidence. See generally, Wyden, *The Hired Killers* 193-98 (1963).

with unusual wealth, all exercise greater authority and command greater respect. The balance of power rests with the New York leaders, and New York has always been at least the unofficial headquarters of the entire organization.

4. Organized crime today has impact which cuts across our society.

a. Gambling.

Organized crime has never limited itself to one particular criminal activity.[36] Law enforcement officials agree today, however, that syndicated gambling is the greatest source of revenue for organized crime. The general prevelence of gambling seems to argue as a major premise that gambling is a fundamental human activity that cannot be suppressed. From this, the professional gambler has led the American people unquestioningly into the patently false conclusion that gambling must therefore be controlled by the professional.[37] In truth, the operations of the profes-

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[36] Unless otherwise noted, this data on gambling is taken from *President's Report* at 188-99.

[37] *Syndicated Gambling in New York State:* A Report of the New York State Commission of Investigation, 101 (1961). The underlying data in this report was developed largely through the use of court order wiretaps.

Assuming the mores of the community would support wholesale legalization, it would be no panacea. Aspects of the industry would still have to be regulated. Judgments, for example, would have to be made, inter alia, on issues such as credit gambling, the enforcement of gambling debts, age limits, the number of permissible places and types of gambling, the honesty of the games, the character of people permitted to run the games, and the extent of taxation on the games. See generally, Peterson, *Gambling—Should It Be Legalized?* (1951). Indeed, it may be fairly observed that legalization would merely change the battleground, not end the law enforcement war associated with gambling. The verdict on legalization, where it has been tried, moreover, is not yet in. New York's attempt with legalized bingo, for example, was at first a

sionals can only be described as parasitic and corruptive. The estimated annual net take is placed at 7 billion dollars.[38] Professional gambling today ranges from simple lotteries to bookmaking on horse or sports events. Most of our nation's large slum areas have within them some form of a lottery known as "numbers."[39] Bets are placed on any three digit numbers from 1 to 1,000. The mathematical odds of winning are, therefore, 1,000 to 1. Seldom, however, is the pay-off over 500 to 1, and then, on "cut numbers," it is even less.[40] The "gambler" thus seldom gambles. In addition, he hedges his bet by a complicated "lay-off"[41] system. Assuming an honest pay-off then—often not the case[42]—the ultimate effect of the racket is to drain the income of slum residents away from food,

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failure. See generally, *Bingo Control Inquiry:* A Report to Nelson A. Rockefeller (1962); *An Investigation of Bingo in New York State:* A Report by the New York State Commission of Investigation (1961). Nevada has apparently tried manfully to control its major industry, yet allegations of undercover Cosa Nostra control and widespread "skimming" of unpaid tax money remain, *New York Daily News,* July 11, 1966, p. 2, col. 1 (One million a month taken without tax payment and distributed to leaders in New York, Chicago, Newark, Cleveland and Miami), although the Nevada Gaming Commission has found no evidence to support the allegations. *Nevada Gaming Commission Report of Sept. 1, 1966.* England and The Bahamas, too, are having difficulty. Cf. *New York Times,* March 10, 1967, p. 4, col. 5, and Sept. 13, 1966, p. 49, col. 1; p. 50, col. 2. The point is that there is no single answer to the organized crime gambling problem.

[38] *Id.* at 33. Organized crime's combined take from all illegal activities is probably twice that gained from all other crime combined. *Id.* at 32.

[39] See generally, *An Investigation of Law Enforcement in Buffalo:* A Report of the New York State Commission of Investigation, 31-42 (1961).

[40] *Id.* at 35.

[41] *Id.* at 37-38.

[42] *Ibid.*

clothing, shelter, health and education. This says nothing of the corruption, discussed below, always associated with enforcement of these laws. The professional bookmaker,[43] on the other hand, has at least the virtue of exploiting primarily those who can afford it. Yet he seldom "gambles" either. He gives track odds or less without track expenses, is invariably better capitalized or lays off, takes credit bets to off-balance the bettor's judgment and stimulate the play, and finally, often as not, fixes the event by corrupting private and professional sports to his own ends.[44] Honest police enforcement of existing laws is widely hampered, inter alia, by the use of modern scientific developments such as flash paper [45] or the telephone and organizational techniques such as street level fungible personnel. The

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[43] See generally, *Syndicated Gambling in New York State:* A Report of the New York State Commission of Investigation 18-57 (1961).

[44] See generally, *Gambling and Organized Crime,* S. Rep. No. 1310, Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 87th Cong., 2nd Sess. 26-33 (1962) on the aspect of corruption. Cf. *Carbo* v. *United States,* 314 F. 2d 718 (9th), *cert. denied,* 377 U.S. 953 (1964), which deals out an attempt by Paul "Frankie" Carbo, a *soldata* in the Gaetano "Three Finger Brown" Lucchese family, *Organized Crime Report* at 24, to take over Don Jordan, a welterweight fighter. The story is typical.

[45] Records of gambling operations today are most often kept on highly combustible paper which immediately ignites completely with the touch of a cigarette. *Syndicated Gambling in New York State:* A Report of the New York State Commission of Investigation 22 (1961). See generally, Blakey, "The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California," 112 *U. of Pa. L. Rev.* 499 (1964), on the law enforcement problems involved in the requirement of pre-entry notice in gambling raids. For example, it may take no less than thirty seconds to destroy all of the evidence of a wire-service headquarters. *Gambling and Organized Crime,* S. Rep. No. 1310, Permanent Subcommittee on Investigations, Committee on Government Operations, 87th Cong., 2nd Sess. 11 (1962).

need to deprive the organization of its most important means of communication and to get beyond the street level in enforcement is crucial.

b. Narcotics.

Next to professional gambling, most law enforcement officials agree that the importation and distribution of narcotics, chiefly heroin, is organized crime's major illegal activity.[46] Its estimated take is 350 million dollars a year.[47] More than one half of the known heroin users are in New York city. Others are located primarily in our other great metropolitan areas. Within the cities, addiction is largely found in areas with low average income, poor housing and high delinquency rates. The addict himself is likely to be male, 21-30, poorly educated, unskilled, and a member of a disadvantaged minority group. The destruction of the human personality, the violation of human dignity, even death,[48] association with addiction need not here be belabored. More, however, is involved. Environment, too, is affected. The cost of narcotics varies, but it is seldom low enough to permit the typical addict to obtain the money for drugs by lawful means. Estimates of the percentage of crime caused by addiction run to 50%; although the figure cannot be accurately assessed, it is clear that it is high. Thus, addiction in the ghetto seriously affects the quality of life in the whole city.[49]

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[46] Unless otherwise noted, this data on narcotics is taken from *President's Report* at 211-31.

[47] *President's Report* at 33.

[48] The death toll from narcotics in New York City alone runs over one hundred per year. *Johnson* at 409 n. 59.

[49] Strikingly, recent surveys of attitudes of people living in the Harlem and Watts areas of New York City and Los Angeles ranked crime and drug addiction with housing and economic conditions as the most serious problems faced in the ghetto. *Federal Role in Urban Affairs,* Hearings before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United

The need for action in the direction of medical and psychological treatment of the addict and general improvement of the social environment that produces him seems clear Cf. *Robinson* v. *California,* 370 U.S. 660 (1962) [49a] It is, however, a false dichotomy which sees this and law enforcement as mutually exclusive alternatives. Addiction to narcotics may be a symptom, but their importation and distribution is the vilest sort of exploitive crime.

The narcotic traffic on the east coast is run by organized crime, and the product is European in origin. Grown in Turkey, diverted from legitimate markets, refined in the Near East and France, the heroin is finally smuggled into the United States.[50] The importers, generally top men in organized crime, do not handle and seldom see a shipment of heroin; their role is strictly supervisory and financial. "Fear of retribution, which can be swift and final, and a code of silence protect them from exposure." [51] Through persons working under their direction, the heroin is distributed to high-level wholesalers; low level wholesalers are at the next echelon; finally, pushers, often addicts, and the addicts themselves make up the last rung.

Primarily because all of the transactions are consensual, cf. *Lewis* v. *United States,* 35 L.W. 4072, 4074 (1966)

States Senate, 89th Cong., 2nd Sess., Pt. 6, 1408, 1409, 1410, 1416, 1419, 1420, 1421 (1966). Typical is the following: ". . . when people talked about 'problems of Harlem' or even 'problems in my block,' the mention of integrated schools, busing, police brutality or some other problems . . . just don't get much attention or mention." *Id.* at 1422. Instead "they chose to talk about inadequate housing, and the problems which are offspring of that major problem, such as crime, dope addiction, winos, and inadequate police protection." *Ibid.*

[49a] See generally, *New York Times,* March 27, 1967, p. 1, col. 3, for a detailed analysis of New York's new civil treatment experiment.

[50] See generally, *Organized Crime Report* at 56-69.

[51] *President's Report* at 218.

(Warren, Chief J.), law enforcement is at all levels difficult, most difficult at the highest. Dangerous undercover operations and the use of insider informants are essential. The top men are hard to identify; they always have a shield of people in front of them, and by not handling the drugs, they incur no direct liability for possession, sale, or other prohibited acts. Generally, they are vulnerable only through the conspiracy laws, and this requires live testimony or a substitute. Unless the communications of the top men can be intercepted or overheard, enforcement will remain largely confined to the lower levels. As in gambling operations, low level personnel are expendable and are most often "stand up guys." Even under present limitations, however, enforcement has been successful in reducing "the incidence of addiction in the general population. . . ." [52] Further reductions seem unlikely without a strengthening of the evidence gathering process, including the authorization of electronic surveillance techniques.[53]

c. Loan Sharking.

Close to or on an equal level with narcotics, most law enforcement officials agree that loan sharking is organized crime's next major illegal activity.[54] Its estimated take is 350 million dollars a year.[55] Like narcotics, loan sharking is organized in a hierarchical structure. At the top is the boss who lends to trusted lieutenants large sums of cash

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[52] *Id.* at 219.

[53] See generally, *President's Advisory Commission on Narcotics and Drug Abuse* 31-53 (1963).

[54] Unless otherwise noted, this data on loan sharking is taken from the *President's Report* at 189 or *The Loan Shark Racket:* A Report by the New York State Commission of Investigation (1965). A major source of the information developed before the Commission stemmed from the Central Intelligence Bureau of the New York City Police, which uses as its major investigative tool electronic surveillance equipment.

[55] *President's Report* at 33.

usually at the rate of 1% per week. Under the lieutenants are street-level loan sharks who deal directly with the debtors. The rates varies, but is normally 5% per week. Occasionally, the lieutenant will make large loans himself—in the neighborhood of one million dollars. The setup also involves "steerers," who will direct possible borrowers to the loan sharks. These individuals can be anyone who comes into contact with large numbers of people. Finally, there is the "enforcer," who sees to it that the debts are paid.

The victims of loan sharks come from all segments of society: the professional man, the industrialist (particularly in areas like the garment industry), contractors, stock brokers, bar and restaurant owners, dock workers, laborers, narcotic addicts, bettors and the bookmakers themselves. Only two prerequisites are required: a pressing need for ready cash and no access to regular channels of credit—again demonstrating the exploitative character of organized crime. Repayment is everywhere compelled by force. Often debtors in over their heads are pressed into criminal acts to pay-off, including embezzlement, acting as number writers, or fingermen for burglary rings. Law enforcement activity is here even more difficult than in gambling and narcotics. Records need not be kept. Nothing is illegally possessed. The standard organized crime insulation shield is made doubly difficult to pierce when by definition the victims are already in bodily fear. Again, the need to intercept or overhear is crucial.

d. Legitimate Business.

Legitimate business is another area in which organized crime is extending its influence.[56] In many cities, it dominates the fields of juke-box and vending machine distribution. Laundry services, liquor and beer distribution, night

[56] Unless otherwise noted, the data on the infiltration of legitimate business is taken from *President's Report* at 189-90 or from the summary of primary sources in *Johnson* 403-7.

clubs, food wholesaling, record manufacturing, the garment industry and a host of other legitimate lines of endeavor have been invaded.[57] Control of business concerns has usually been acquired by the sub-rosa investment of profits acquired from illegal ventures, accepting business interests in payment of gambling or loan shark debts, or using various forms of extortion. Often, after take over, the defauted loan is liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques.[58] Oftentimes, however, the organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful the organization begins to extract a premium price from customers. Purchases by infiltrated businesses are always made from specified allied firms.

With its extensive infiltration of legitimate business, organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons

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[57] See generally *Kefauver Report* at 151-64. The list of industries noted there included advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drug stores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, juke box, laundry, liquor, loan, news services, newspapers, oil, paper products, radio, real estate restaurants, scrap shipping, steel, surplus, television, theaters, and transportation.

[58] Planned bankruptcy fraud is called "scam." More than 250 such scam operations are pulled off each year, netting around $200,000 per job. See generally, *Criminal Law and Procedures*, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, 89th Cong., 2nd Sess. 204-6 (1966). Detailed out is one classic scheme by Carmine Lombardozzi, one of the nation's top loan sharks and a *caporegime* in the Carlo Gambino family in New York city. *Organized Crime Report* at 26.

free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it inevitably seems to bring to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are thus eliminated and customers are confined to sponsored suppliers. Its effect is even more unwholesome than other monopolies because its position does not rest on economic superiority.[59] And law enforcement here is complicated in most of the ways noted above in the areas of illegal businesses.

e. Legitimate Unions.

Closely paralleling its takeover of business, organized crime has, in addition, moved into legitimate unions.[60]

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[59] See generally, S. Rep. No. 1139, Select Committee on Improper Activities in the Labor or Management Field, United States Senate, 86th Con., 2nd Sess. 733-866 (1960) for a detailed account of the infiltration of the coin-operated machine industry.

[60] Unless otherwise noted the data on the infiltration of unions is taken from the *President's Report* at 190-91. See generally, S. Rep. No. 1417, Select Committee on Improper Activities in the Labor or Management Field, United States Senate, 85th Cong., 2nd Sess. (1958); S. Rep. No. 621, *Ibid.*, 86th Cong., 1st Sess. (1959); and S. Rep. No. 139, *Ibid.*, 86th Cong., 2nd Sess. (1960) (The McClellan Committee Reports). The McClellan Committee's work depended significantly on the use of state court order wiretaps; they were considered "vitally important." Maguire, *Evidence of Guilt* §6.00 n. 16 (1959) (Citations to the Committee's Hearings are collected). Reference should also be made to *American Guild of Variety Artists*, S. Rep. No. 310, Permanent Subcommittee on Investigations, Committee on Government Operations, 88th Cong., 1st Sess. (1963), which deals with improper relations between this union and racketeers in Chicago, and *James R. Hoffa and Continued Underworld Control of New York Teamsters Local 239*, S. Rep. No. 1784, Permanent Subcommittee on Investigations, Committee on Government Operations, 87th Cong., 2nd Sess. (1962), which deals with the control Anthony "Tony Ducks" Corallo exercised over the union. This Report

Control of labor supply through control of unions prevents the unionization of some industries or guarantees sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. All of this, of course, makes a mockery of much of the promise of the social legislation of the last half century. And, again, the same basic law enforcement problems appear.

f. Democratic Processes.

A community can safely tolerate a certain level of criminal activity. Indeed, crime will never be totally eliminated. First to exist, then to increase its profits, however, organized crime has found it necessary to corrupt the institutions of our democratic processes.[61] Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition era. Yet everything indicates that organized crime flourishes best only in a climate of corruption.[62] And as

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shows vividly how electronic surveillance equipment can be used to strike at corruption. Corallo is a *caporegime* in the Gaetano "Three Finger Brown" Lucchese family of New York city, *Organized Crime Report* at 24. This is the same Corallo who was convicted with Elliott Kahaner, an assistant United States attorney, and James Keogh, a New York Supreme Court judge, of improper attempts to influence justice. *United States* v. *Kahaner*, 317 F.2d 459 (2nd), *cert. denied*, 375 U.S. 836 (1963).

[61] Unless otherwise noted the data on the corruption of democratic processes is taken from the *President's Report* at 191 or the summary of primary sources in *Johnson* at 412-14, 419-22.

[62] "The largest single factor in the breakdown of law enforcement agencies in dealing with organized crime is the corruption and connivance of many public officials." *A.B.A., Report on Organized Crime and Law Enforcement* 16 (1952-53).

the scope of organized crime's activities has expanded, its need to corrupt public officials at every level of government has grown. With the expansion of governmental regulation of private and business activity, moreover, the power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen. "Contrast, for example, the way governmental action in contract procurement or zoning functions today with the way it functioned only a few years ago."[63] The potential for harm today is greater if only because the scope of governmental activity is greater.

Organized crime has money, and money underwrites politics. The scope of the growing political influence of organized crime is thus well illustrated by the conservative estimate of the most comprehensive examination of the relation between crime and politics yet undertaken; it put the level of all contributions stemming from criminal sources at 15%.[64] At various times, organized crime has thus been the dominant political force in such metropolitan centers as New York, Chicago, Miami and New Orleans. Only fortuitous circumstances prevented the takeover of Portland, Oregon and Kansas City, Missouri. Smaller communities such as Cicero, Illinois, and Reading, Pennsylvania, have been virtual baronies of organized crime. This list of examples could be extended almost indefinitely.

A political leader, legislator,[65] police officer, prosecutor or judge who owes allegiance to organized crime cannot

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[63] *President's Report* at 191.

[64] See generally, Heard, *The Costs of Democracy* 154-68 (1960).

[65] Illinois, for example, stands out as the state where corruption in the legislature has been the most blatant. For years the infamous "West Side Block" has fought, often successfully, against legislation contrary to the best interests of organized crime. One of its leaders, Roland Libonate, graduated from the State Senate to the United States House of Representatives, where he sat until recently on the House Judiciary Committee. See generally, *Kefauver Report* at 40; Simon, "The Illinois Legislature: A Study in Corruption," *Harper's* Sept. 1964, pp. 74-78.

render proper service to the public. When a newly nominated judge in New York city pledged undying loyalty to a Cosa Nostra boss for procuring his selection to the bench he perverted his office and all it stood for.[66] When the organization requests, such a man must protect hoodlums who have committed not only gambling offenses but also murder or other crimes of personal violence. He is no longer a public servant, selected by and accountable to the people, as democracy demands; he is the servant of a small class of professional criminals. Accustomed to accepting bribes from the criminal organization, many of the public servants, moreover, soon begin to expect side payments for acts done in the usual course of business. The official thus soon loses any sense of allegiance to the public or to the moral standards which good government demands. We could tolerate, in short, relatively large amounts of vice and street crime, but little governmental corruption.

g. Value Structure.

There is a final way in which organized crime seriously affects the quality of American life. Mr. Justice Brandeis in his classic dissent in *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) rightly suggested that: "Our government is the potent, the omnipresent teacher. For good

[66] The incident involved Judge Thomas Aurelio and Frank Costello, the successor head of the Luciano family in New York city. *Organized Crime Report* at 20. It is described in *Kefauver Report* at 102-5. The pledge of undying loyalty came over a court ordered wiretap. There is no question that the wiretaps made by the New York County District Attorney's Office constituted the major source of information for the Kefauver Committee's investigation in New York city. *State of New York, Commission of Investigation,* Hearings April 5 and 6, 1960, p. 27. The Committee itself stated: ". . . the wire taps in particular gave a vivid picture of Frank Costello as a political boss and an underworld emperor." *Kefauver Report* at 103. It is difficult to imagine an alternative source of information which would have developed this kind of data. Certainly the participants could not be expected to cooperate. Without their cooperation, the evidence was unavailable absent electronic surveillance.

or for ill, it teaches the whole people by its example." Mr. Justice Brandeis spoke in the context of lawless law enforcement. There is, however, another way in which government teaches by example. Its failures, too, do not go unnoticed, especially among the young, who see what we do and seldom listen to what we say. Unlike other successful criminals who operate outside of an organization and who require anonymity for success, the top men in organized crime are well known both to law enforcement agencies and to the public. In earlier stages of their careers, they may have been touched by law enforcement, but once they attain top positions in the rackets, they acquire a high degree of immunity from legal accountability.[67] The statement[68] of a leading worker with gang boys long ago pointed out the effect of this process:

> When a noted criminal is caught, the fact is the principal topic of conversation among my boys. They and others lay wagers as to how long it will be before the criminal is free again, how long it will be before his pull gets him away from the law. The youngsters soon learn who are the politicians who can be depended upon to get offenders out of trouble, who are the dive-keepers who are protected. The increasing contempt for law is due to the corrupt alliance between crime and politics, protected vice, pull in the administration of justice, unemployment, and a general soreness against the world produced by these conditions.

As part of organized crime, an ambitious young man knows that he can rise from body guard and hood to pillar of the community, giving to charities, dispensing political favors, sending his boys to West Point and his girls to debutante balls.[69] The President's Commission on Law

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[67] *A.B.A. Report on Organized Crime and Law Enforcement* 13 (1952-53).

[68] Quoted in Thrasher, *The Gang* 455 (1927).

[69] Tyler, *Organized Crime in America* 288 (1962).

Enforcement and the Administration of Justice [70] summed it up in these terms:

> In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society. As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.
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> The extraordinary thing about organized crime is that America has tolerated it for so long.

II

CRIMINAL SANCTIONS CAN CONSISTENTLY BE BROUGHT TO BEAR ON ORGANIZED CRIME AND CORRUPTION ONLY BY THE USE OF ELECTRONIC SURVEILLANCE TECHNIQUES.

A. Existing Studies Demonstrate the Need for Electronic Surveillance Techniques.

To establish that organized crime represents a serious and growing threat to values deeply held by our society is not to establish that electronic surveillance techniques are necessary or reasonable investigative procedures. Ideally, of course, we should have "empirical statistics,"

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[70] *President's Report* at 209.

Elkins v. *United States*, 364 U.S. 206, 218 (1960) (Stewart, J.), demonstrating the effectiveness and social costs of the use of these techniques and exploring the various alternatives.[71] Such statistics, however, are not now available and are not likely to become available.[72] Criminal investigations deal with virtually unique problems of human behavior and motivation; they cannot be reproduced in a laboratory for purposes of scientific verification. The problem of assessing social cost is equally difficult. How do you evaluate a society without a certain level of organized crime or with it? How could you determine with accuracy the degree to which a social fear of electronic surveillance is rational or irrational, attributable to private use, or to lawful or unlawful public use, or any number of other tough but essential questions in this area? It is, of course, possible to develop a large enough statistical sample of similar criminal investigative situations from which some valid generalizations can be drawn. Yet the real difficulty comes in finding sufficiently similar situations and then in holding constant other factors so that one factor may be isolated, varied, and conclusions determined. Even assuming cross comparisons can be scientifically made, the larger the number of situations, the greater chance that variations in the other factors will develop, thus making objective answers to questions of cause and effect extremely difficult to obtain. It is unlikely, therefore,

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[71] Cf. Paulsen, "Book Review: *Dash, Schwartz and Knowlton, The Eavesdroppers*", 14 *Rutgers L. Rev.* 636 (1960).

[72] The difficulties involved in obtaining them were recognized in the *Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communication* (1957), reprinted in *Wiretapping, Eavesdropping, and the Bill of Rights*, Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2nd Sess., Pt. 2, 460-99 at 481 (1958) (Hereinafter cited *Privy Councillors Report*). Even so, it goes without saying that if this Court now holds the use of electronic surveillance techniques unconstitutional, little or no opportunity for their systematic development will exist.

that the social sciences will in the foreseeable future provide us with hard answers to the many difficult questions of social policy we face in this and similar problem areas.[73]

But to say that we do not have empirical data is not to say that "pragmatic evidence" is "wanting." *Elkins* v. *United States,* 364 U.S. 206, 218 (1960) (Stewart, J.). We have, for example, the testimony of the great majority

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[73] The absence of hard data is a problem faced across the board in the administration of justice. Yet here, as elsewhere, we are "faced with too urgent a need for action to stand back for a generation and engage in research. • • • Only by combining research with action can future programs be founded on knowledge rather than on informed or perceptive guesswork." *President's Report* at 13.

It is possible to settle this lack of data by an allocation of burden of proof. The rule has long been established that legislative enactments are to be presumed constitutional. See, *e.g., Nicol* v. *Ames,* 173 U.S. 509, 514-15 (1899). Therefore, the absence of data showing that the harm of electronic surveillance outweighs the benefit should result in any challenged statute being upheld. Such an approach to the very real problems involved in this area, however, would be altogether too glib. The contrary approach stands on a similar footing. The absence of hard data showing that the benefit outweighs the harm should not result in the statute being struck down. *But see,* Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's (Part II)," 66 *Colum. L. Rev.* 1206, 1207-8 (1966). What has to be done here, as in so many areas of social policy, is to do what we can with what we have. To expect more is to expect too much. "Precision is not to be sought for alike in all discussions; it is the mark of an educated man", Aristotle taught, "to look for precision in each class of things just so far as the nature of the subject admits. . . ." McKeon, *Introduction to Aristotle: Ethics* 309-10 (Modern Library 1947). Much of our modern understanding of human psychology, for example, rests on clinical not empirical data. Rightly so, the law has not waited for empirical data before making attempts at reform. Cf. *Durham* v. *United States,* 214 F.2d 862 (D.C. 1954). There likewise seems to be no reason for demanding such data *either way* in this area. On "scientific proof" in the area of legal problems, see generally, Frank, *Courts on Trial* 209-19 (Atheneum 1963).

of knowledgeable law enforcement officials that "the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques."[74] While this testimony is entitled to great weight, it cannot, of course, be the determining factor. We have, in addition, a number of studies of the prob-

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[74] *President's Report* at 201. References to other opinions are contained in Semerjian, "Proposals on Wiretapping in Light of Recent Senate Hearings," 45 *Boston U. L. Rev.* 216, 230-31 (1965). Acceptance or rejection of these opinions should include a consideration of the extent of the organized crime problem in their area, their experience with electronic surveillance techniques, and their success with or without use of the techniques. The position of the United States Department of Justice should also be considered. Every Attorney General since 1931 has authorized the use of these techniques in some situations. The history of the Department's position is traced in Rogers, "The Case for Wiretapping," 63 *Yale L. J.* 792 (1954). Indeed, the Department has recently acknowledged to this Court the selective use of trespatory "listening devices" as well as the "interception of telephone and other wire communications." *Black* v. *United States,* No. 1029 Oct. Term 1965, *Supplemental Memorandum for the United States* at 4. The extraordinary aspect of this memorandum was not that it acknowledged the use of these techniques in the past in national security, organized crime and other cases, but that it made the announcement that it would *continue* to use them *without warrants* in the future albeit in a more limited class of situations. Cf. *Silverman* v. *United States,* 365 U.S. 505 (1961); 18 U.S.C. 2236. *Compare, United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944) (Insurance held commerce for anti-trust). This brief is, of course, not addressed to the national security aspects of the use of these techniques. Yet we assume that even foreign spies are entitled to constitutional treatment by our government. Cf. *Abel* v. *United States,* 362 U.S. 217 (1960). Thus, the national security implications of the decision in this appeal must also be considered by the Court. Our immediate concern, however, must be limited to the sphere of our proper concern. Cf. *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956).

lem.[75] Only two, however, warrant this Court's serious attention here: the report of Privy Councillors in 1957, and the recent Report of the President's Commission on Law Enforcement and the Administration of Justice.

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[75] Apart from the two studies mentioned in the text, the best Federal Study was conducted by the Ervin Committee. For several years, the Committee periodically held hearings in which a wide range of opinion was collected. The Committee also reprinted in its hearings a number of valuable and otherwise generally unavailable documents. See generally, *Wiretapping and Eavesdropping, Summary—Report of Hearings 1958-61,* Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong., 2nd Sess. (1962). Foreign law, which generally permits the use of electronic surveillance techniques to law enforcement, is summarized in *Wiretapping, Eavesdropping, and the Bill of Rights.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 85th Cong., 2nd Sess., Appendix to Hearings of May 20, 1958, 137-86 (1958). The Long Committee has also recently been looking into a wide range of practices which bear on privacy. While it has uncovered illegal use of these techniques on the Federal and State level, the study is seriously defective and here inapposite because it has not undertaken to examine the operation of the court order systems in either Nevada, Maryland, Oregon, Massachusetts or New York. See generally, *Invasions of Privacy,* Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., Pt. 1 (1965) and succeeding volumes. On the state level, the best study was undertaken by the Savarese Committee in New York. See generally, *Eavesdropping and Wiretapping,* A Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communication (1956); *Eavesdropping, Wiretapping and Licensed Private Detectives,* A Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications (1957), both reprinted in, *Wiretapping, Eavesdropping and the Bill of Rights,* Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2nd Sess., Pt. 2, 267-457 (1958). Today, however, it is dated. Bugging was only brought under the court order system after the study. During the study, moreover, the provisions of the existing law were not then enforced through the suppression sanction.

1. The Report of the Privy Councillors.

In June of 1957, three Privy Councillors were appointed to inquire into the interception of communications in Great Britain.[76] The practice over a twenty year period

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Cf. *People* v. *McCall*, 17 N.Y.2d 152, 269 N.Y.S.2d 396, 216 N.E.2d 570 (1966). For example, the Committee found that police affidavits were "extremely sketchy" and that there was abuse by low level police of wiretap information. *Eavesdropping and Wiretapping, Id.* at 296-302. The President's Commission on Law Enforcement and the Administration of Justice, however, found that this picture has "changed substantially under the impact of pretrial adversary hearing on motions to suppress" and that "legislative and administrative" controls have "apparently been successful in curtailing" incidence of low-rank police "abuse." *President's Report* at 202. This New York experience also supports the Commission's conclusion that a national court order system "would significantly reduce the incentive for, and the incidence of, improper electronic surveillance. *Id.* at 203. New York, too, has shown a willingness to prosecute private eavesdroppers. See *New York Times*, Dec. 16, 1966, p. 1, col. 5. There is no question that New York's experience with *Mapp* v. *Ohio*, 367 U.S. 643 (1961) has greatly improved its criminal procedure. The *McCall* decision thus bids equally well in the area of electronic surveillance. The affidavit in this appeal is unfortunately a better illustration of pre-*Mapp*—pre-*McCall* procedure than it is of today's practice. There is no question that the Office of the District Attorney had probable cause to use the equipment; the only problem is in the degree to which the affidavits on their face disclosed it to the judge issuing the orders. On the private level, the best study is *Dash, Schwartz and Knowlton, The Eavesdroppers* (1959). It, too, is now dated. There is also some question of the accuracy of some of its conclusions; the researchers did not always have access to the best sources of information. It is evaluated in *"The Wiretapping-Eavesdropping Problem: Reflections on The Eavesdroppers: A Symposium"*, 44 *Minn. L. Rev.* 813-940 (1960). Most of the others can only be described as journalistic sensationalism. See, *e.g.*, Packard, *The Naked Society* (1964); Brenton, *The Privacy Invaders* (1964).

[76] Unless otherwise noted this information is taken from *Privy Councillors Report*. The Report took up only wiretapping, but its conclusions are equally applicable to other forms of electronic surveillance.

was examined. After reviewing the historical source of the power as exercised by the police, the Councillors took up the purposes and extent of its use. The Report indicated that the power to intercept was limited to serious crimes and issues of the security of the state. Serious crime was understood to mean a crime for which a long term of imprisonment could be imposed or a crime in which a large number of people were involved. Interception could only be on a warrant issued by the Home Secretary. Three requirements were set out:

(1) The offense must be really serious;

(2) Normal methods of investigation must have been tried and failed, or must from the nature of things be unlikely to succeed if tried;

(3) There must be good reason to think that an interception would result in a conviction.[77]

The Councillors found that metropolitan police used interception chiefly "to break up organized and dangerous gangs . . ."[78] The experience of the police was that much of the major crime in England stemmed from gangs located in London. According to the police, the leaders of the gangs needed the telephone to communicate with their henchmen. The chief use of interception by the Board of Customs and Excise, on the other hand, was in the area of diamond smuggling. Their experience was that the traffic was organized by a "very small, closed group" in which it was "hard to get reports from informers or by normal means of detection."[79] Again, the telephone was widely employed by the individuals. Finally, the Councillors noted that in espionage the weakest link was com-

[77] *Id.* at 473.

[78] *Id.* at 480.

[79] *Ibid.*

munication, and without penetration of this link, detection would be almost impossible.

The Councillors refrained from making any hard judgements on effectiveness in terms of alternatives, noting the impossibility of certain conclusions in this area. But based on their examination, they had no question but that its use was necessary in certain kinds of cases. They observed:

> The freedom of the individual is quite valueless if he can be made the victim of the law breaker. Every civilized society must have power to protect itself from wrongdoers. It must have power to arrest, search and imprison those who break the laws. If these powers are properly and wisely exercised, it may be thought that they are in themselves aids to the maintenance of the true freedom of the individual.[80]

The Councillors concluded that no steps should be taken to deprive the police of the power of interception. They noted:

> But so far from the citizen being injured by the exercise of the power in the circumstances we have set out, we think the citizen benefits therefrom. The adjustment between the right of the individual and the rights of the community must depend upon the needs and conditions which exist at any given moment, and we do not think that there is any real conflict between the rights of the individual citizen and the exercise of this power . . . . The issue of warrants . . . will permit the freedom of the individual to be unimpeded, and make his liberty an effective, as distinct from a nominal, liberty.[81]

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[80] *Id.* at 487

[81] *Id.* at 489.

They continued:

> We cannot think it to be wise or prudent or necessary to take away from the Police any weapon or to weaken any power they now possess in their fight against organized crime of this character.*** If it be said that the number of cases where methods of interception are used is small and that an objectionable method could therefore well be abolished, we feel that . . . this is not a reason why criminals in this particular class of crime should be encouraged by the knowledge that they have nothing to fear from methods of interception.*** This, in our opinion, so far from strengthening the liberty of the ordinary citizen, might very well have the opposite effect.[82]

Finally, they concluded:

> If it should be said that at least the citizen would have the assurance that his own telephone would not be tapped, that this would be of little comfort to him, because if the powers of the Police are allowed to be exercised in the future, as they have been in the past under the safeguards we have set out, the telephone of the ordinary law-abiding citizen would be quite immune.... (I)f it is said that when the telephone wires of a suspected criminal are tapped all messages to him, innocent or otherwise, are necessarily intercepted too, it should be remembered that this is really no hardship at all to the innocent citizen.*** This cannot properly be described as an interference with liberty; it is an inevitable consequence of tapping the telephone of the criminal; but it has no harmful results . . . . The citizen must endure this inevitable consequence in order that the main purpose of detecting and preventing crime should be achieved. We cannot think, in any event, that the fact innocent

[82] *Ibid.*

messages may be intercepted is any ground for depriving the Police of a very powerful weapon in their fight against crime and criminals.*** To abandon the power now would be a concession to those who are desirous of breaking the law in one form or another, without any advantage to the community whatever.[83]

2. The Report of the President's Commission on Law Enforcement and the Administration of Justice.

When the President called together his Commission on Law Enforcement and the Administration of Justice, he asked it "to determine why organized crime has been expanding despite the Nation's best efforts to prevent it."[84] The Commission identified a number of factors.[85] The major problem, however, related to matters of proof. "From a legal standpoint, organized crime," the Commission concluded, "continues to grow because of defects in the evidence gathering process."[86] The Commission reviewed the difficulties experienced in developing evidence, many of which were noted above in this brief's discussion of organized crime, and then concluded, simply enough, that under "present procedures, too few witnesses have been produced to prove the link between criminal group

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[83] *Id.* at 491. This conclusion must be placed in the context of the statement of Sir Patrick Devlin, Justice of the High Court of England, that his country—at least as late as 1958 before its troubles with legalized gambling began—had "comparatively little organized crime", Devlin, *The Criminal Prosecution in England* 134 (1958).

[84] *President's Report* at 188.

[85] See generally, *President's Report* at 198-200.

[86] *Id.* at 200.

members and the illicit activities that they sponsor."[87] It was in this context, therefore, that the Commission examined the testimony of law enforcement officials that

[87] *Ibid.* Due process requires that prosecution for crime be supported by evidence. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). Ultimately, this means someone must take the stand in open court, *People* v. *Jelke,* 308 N.Y. 56, 123 N.E.2d 769 (1954), and relate what he saw or heard subject to cross examination. *Pointer* v. *Texas,* 380 U.S. 400 (1965). Yet the ideology of the underworld keeps insiders silent, *Organized Crime Report* at 7-8, and others are regularly threatened, bribed or murdered. The testimony of Charles Siragusa, Executive Director of the Illinois Crime Commission is illustrative:

"In a case we recently investigated a leading and vicious Chicago juice—or loan shark—racketeer bribed the female owner of a tavern who had previously identified to the police three armed robbers. They were members of his large stable of hijackers, musclemen, and assassins. As added insurance, this mobster suggested to the terrified woman that an 'accident' would happen to her and her family if she betrayed him. She subsequently refused to testify. Our investigator eventually convinced her to testify. We obtained convictions, but the defendants were released on appeal bonds. The witness' home and tavern were guarded by the police for several months thereafter. This type of surveillance naturally restricted the free, daily movements of the witness as well as her family. So much so, that the surveillance was discontinued at her request. A few days later a fire broke out on her rear porch, devouring the home and killing her five-year-old son. As a result of this tragedy the boy's father has been a state of perpetual alcoholic stupor." *Criminal Law and Procedures,* Hearings before the Subcommittee on Criminal Law and Procedures, Committee on the Judiciary, United States Senate, 89th Cong., 2nd Sess., 211-12 (1966).

Then Attorney General Nicholas de B. Katzenbach has also testified in 1965: "We must dismiss (organized crime cases) because key witness or informants suffer 'accidents' and turn up, for example, in a river wearing concrete boots. Such accidents are not unusual. We have lost more than 25 informants in this and similar ways in the past 4 years. We have been unable to bring hundreds of other cases because key witnesses would not testify for fear of the same fate." *Invasions of Privacy,* Hearings before the Subcommittee on Administrative Practice and Pro-

electronic surveillance techniques were indispensable to develop adequate strategic intelligence concerning organized crime,[88] to set up specific investigations, to develop witnesses, [89] to corroborate their testimony, and to serve

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cedure, Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., Pt. 3, 1158 (1965). See *Id.* at 1149-50 for statistics on intimidation of Treasury Department witnesses and agents. The Attorney General's reference to "concrete boots" is becoming a thing of the past. Now bodies and cars are crushed in a hydraulic machine in auto junk yards, and neither is ever discovered. *New York Times,* Jan. 21, 1967, p. 64, col. 2. The great advantage electronic tapes have over live witnesses, of course, is that they may not be threatened, bribed or murdered. Fear or favor does not affect them.

[88] The distinction between strategic intelligence and tactical intelligence is developed in *President's Report* at 199, where the failure to develop such intelligence is identified as failure of existing law enforcement practice. The difference in quantity and quality of information developed by the use of electronic surveillance techniques is aptly brought out by the difference shown in the various parts of *Organized Crime Report.* Compare the testimony concerning the New York area with that given about Chicago or Detroit. The difference is striking. Only the Federal Bureau of Investigation has been able "to document fully the national scope of these groups . . ." *President's Report* at 192.

[89] One of the chief uses of electronic surveillance techniques is in developing witnesses. A classic example of this technique is the investigation by the New York County District Attorney's Office into the misuse of union welfare funds by Anthony "Little Augie Pisano" Carfano, a *caporegime* in the Vito Genovese family in New York city. *Organized Crime Report* at 21. Based on a tap made pursuant to court order, Louis Saperstein, an insurance agent, was called before a New York County grand jury. Cf. *In Re Saperstein,* 30 N.J. Super. 373, 104 A.2d 842 (1954), *cert. denied,* 348 U.S. 874 (1954). When he failed to testify after he was granted immunity and would not identify voices on the tapes, he was convicted of contempt. *New York* v. *Saperstein,* 2 N.Y.2d 210, 140 N.E.2d 252 (1957). After spending five weeks in jail, he agreed to cooperate, and based on his testimony and the tapes, indictments and convictions of Carfano and two union officials were obtained. Even at that, the convictions were not

as substitutes for them. The Commission then reviewed the arguments for and against the use of these techniques, examining in particular the New York experience, and concluded:

> All members of the Commission agree on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail.* * *
>
> All members of the Commission believe that if authority to employ these techniques is granted it must be granted only with stringent limitations.* * *

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obtained without difficulty. Saperstein was shot four times in the head after he had agreed to testify and barely survived, but his testimony and the tapes ultimately made the case.

Could Saperstein's testimony have been obtained without the wiretaps? Was there an alternate way in which he could have been induced to cooperate? "Alternatives", Mr. Justice Murphy observed in dissent in *Wolf* v. *Colorado*, 338 U.S. 25, 41 (1949), "are deceptive. Their very statement conveys the impression that one possibility is as effective as the next." The judgment of the men involved is that only through the sound of his own voice on tapes could Saperstein's conviction have been obtained and only through his imprisonment was he convinced to cooperate. The point here was made by Robert F. Kennedy when he was Chief Counsel for the McClellan Committee: "The kind of proof makes a difference. He can say very forcefully someone's a liar—that's easy. But here we had his own voice on the tapes. He couldn't deny it." Quoted in Maguire, *Evidence of Guilt*, § 6.00, p. 247, n. 16. Whatever else is true, moreover, of electronic surveillance, it does not make for "lazy not alert law enforcement." *On Lee* v. *United States*, 343 U.S. 747, 761 (1952) (Frankfurter, J. in dissent). The alternatives are not simply a matter of "shoe leather." Moreland, *Modern Criminal Procedure* 148 (1959). These techniques made a hard task, not easy, but possible. On the contemporary validity of Mr. Justice Frankfurter's experience in Southern District of New York, see Landynski, *Search & Seizure and the Supreme Court* 224 (1966), which suggests it was limited to "white collar" crimes and did not include enough "organized crime."

All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People* v. *Berger*, and further that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority and believe that without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interest of privacy.[90]

The judgements of these two bodies would seem to be determinative of the issues of need and desirability. There remains then only the question whether the use of these techniques can be squared with our constitutional traditions.

III

OUR CONSTITUTIONAL TRADITIONS UNDER THE FOURTH AND FIFTH AMENDMENTS DO NOT PROHIBIT COURT ORDER ELECTRONIC SURVEILLANCE.

A number of serious constitutional objections have been raised against the use of electronic surveillance techniques. Some of them are not answered by establishing that such techniques are indispensable in the investi-

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[90] *President's Report* at 203. The Commission notes organized crime must use and does use the phone because communication is essential to their activities. *Id.* at 201. This is supported by the finding of the McClellan Committee. S. Rep. No. 1139, Select Committee on Improper Activities in the Labor or Management Field, 86th Cong., 2nd Sess., Pt. 3, 487-88 (1960).

gation and prosecution of organized crime and corruption. Nevertheless, it ought to be recognized that no constitutional provision on its face specifically deals with electronic surveillance. What possible constitutional restrictions may be here involved are a development of judicial construction. Even so, no issue has yet been foreclosed. The constitutionality of any scheme of electronic surveillance, as Mr. Justice Brennan observed in *Lopez* v. *United States,* 373 U.S. 427, 465 (1963) (Brennan, J. in dissent), is still "open." Room is yet left for "an imaginative solution whereby the rights of individual liberty and the needs of law enforcement" can be "fairly accommodated." *Id.* The broad question thus presented to this Court is whether or not New York's scheme of court order electronic surveillance constitutes such a fair accommodation.[91]

A. Court Order Electronic Surveillance Is Not Inconsistent with the Free Speech Guarantees of the First Amendment.

Traditionally, our concern with electronic surveillance has centered around issues of search and seizure, cf. *Olmstead* v. *United States,* 277 U.S. 438 (1928), or violations of specific federal statutes, 48 Stat. 1103 (1934), 47 U.S.C. 605 (1958); *Nardone* v. *United States,* 302 U.S. 379 (1937).[92] Recently, it has been suggested that more

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[91] Reference should be made to the substantially similar statutes in Maryland, Massachusetts, Nevada, and Oregon, which are set out above.

[92] Reference should also be made to 18 U.S.C. 2236, which prohibits unlawful search and seizure. Cf. *Silverman* v. *United States,* 365 U.S. 505 (1961). Section 2236 has never been considered in the context of electronic surveillance, but in light of *Silverman,* it would now seem to be applicable. *Compare, United States* v. *South-Eastern Underwriters' Ass'n,* 322 U.S. 533 (1944) (Insurance held commerce for anti-trust). The statute was passed "to the end that government employees without a warrant shall not invade the home of the people and violate the privacies of life." *Agnello* v. *United States,* 269 U.S. 20, 32-33 (1925). These considerations are equally opposite of electronic surveillance.

is involved.[93] Mr. Justice Brennan has rightly observed: "But freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office." *Lopez* v. *United States,* 373 U.S. 427, 470 (1963) (Brennan, J. in dissent). To say what one wishes, to hear what one pleases, or to write what one likes requires a freedom from fear of surreptitious surveillance.

We must be very careful in analyzing this objection to electronic surveillance, for as the President's Commission on Law Enforcement and the Administration of Justice observed: "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively." *President's Report* at 202. Fear of electronic surveillance, however, is not a direct limitation on freedom of speech. If it were, it would, of course, be squarely inconsistent with the First Amendment.[94] Cf. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). At best, it is only an indirect limitation. We must, therefore, carefully analyze the source of the fear. Electronic surveillance may be undertaken by private or law enforcement agents. The acts of private parties are outside the scope of the operation of the Amendment. As to law enforcement agents, we must further distinguish between indiscriminate surveillance and discriminate surveillance. Obviously, indiscriminate would have an indiscriminate

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[93] See generally, Schwartz, "On Current Proposals to Legalize Wiretapping," 103 *U. of Pa. L. Rev.,* 157, 163-64 (1954); King, "Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration," 66 *Dick L. Rev.* 17 (1961); King, "Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations," 33 *Geo. Wash. L. Rev.* 240, 266-67 (1964); Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's (Part II)", 66 *Colum. L. Rev.* 1206, 1240-47 (1966)

[94] The First Amendment, in relevant part, provides: ". . . no law . . . abridging the freedom of speech . . . ."

impact on free speech—no sane society should, or would, tolerate it. Discriminate surveillance, however, presents another question, for more is involved than the question of the indirect impact the surveillance might have on free speech. Picketing, for example, is free speech, *Thornhill* v. *Alabama,* 310 U.S. 88 (1910), but for valid consideration of social policy, it may be regulated, although that regulation obviously has an impact on the exercise of the rights of free speech involved. *International Brotherhood of Teamsters* v. *Vogt,* 354 U.S. 284 (1957). Even those who most strenuously advance the considerations of free speech here candidly recognize that a weighing of values is involved.[95] The problem of free speech and electronic surveillance ultimately becomes, therefore, a question of "reasonableness." And if this is so, the First Amendment objection to electronic surveillance may be reduced to a factor, perhaps a crucial factor, but nonetheless only a factor, which must be taken into account in examining the practice under the Fourth Amendment. For that Amendment prohibits all "unreasonable search and seizures"—and a search and seizure may be unreasonable because of First Amendment considerations. *Stanford* v. *Texas,* 379 U.S. 476, 478-79 (1965); cf. *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964). In testing the constitutionality of any scheme of electronic surveillance, therefore, it is necessary to turn to the Fourth Amendment.[96] If surveillance is reasonable under that Amendment, it should not be unconstitutional under the First Amendment.

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[95] See, *e.g.*, King, "Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration", 66 *Dick L. Rev.*, 57, 162 (1961).

[96] The Fourth Amendment is here involved only to the degree, of course, that the Fourteenth Amendment is involved. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The standards, however, are the same. *Ker* v. *California,* 374 U.S. 23 (1963).

B. Court Order Electronic Surveillance Is Not Inconsistent with the Reasonable Search and Seizure Guarantee of the Fourth Amendment.

1. Section 813-a must meet a test of reasonableness.

Analytically and abstractly, the Fourth Amendment consists of two separate clauses.[97] The first comprehensively subjects search and seizure to a rule of reasonableness; the second sets out in detail the specific requirements for the issuance of warrants for the seizure of persons or tangible objects. As such, the Amendment represents an overriding commitment to a fundamental limitation on official power to arrest, search or seize. The immediate cause of the Amendment was, of course, the hated writs of assistance of our pre-revolutionary period, writs which made possible search and seizure general as to person, object, place, time, justification, and purpose.[98] The essence of the Amendment was early capsulized in Mr. Justice Miller's concurring opinion in *Boyd* v. *United States*, 116 U.S. 616, 641 (1886), a decision which will, as Mr. Justice Brandeis observed in *Olmstead* v. *United States*, 277 U.S. 438, 474 (1928) (Brandeis, J. in dissent),

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[97] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[98] See generally, Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 51-78 (1937). The only redeeming feature was that the search could not take place at night. *Id.* at 54. Otherwise, it was generality with a vengeance.

"be remembered as long as civil liberty lives in the United States." [99]

> The things here forbidden are two—search and seizure. And not all searches or all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed; and if the thing sought be found it may be seized.
>
> While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* search and seizures that are forbidden . . . . (Emphasis in original)

It was echoed in this Court's decision in *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 356-57 (1931) in these words:

> The first clause . . . is general and forbids every search that is unreasonable . . . . The second clause . . . prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches.

And, more recently, it was reaffirmed by Mr. Justice Brennan in *Lopez* v. *United States,* 373 U.S. 427, 454-55 (1963) (Brennan, J. in dissent) in these words:

> The two clauses of the amendment are in the conjunctive, and plainly have distinct functions. The

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[99] Mr. Justice Miller and the Chief Justice disagreed with the majority in finding the process a "search" within the Amendment. For them, the Fifth Amendment's prohibition against compulsory self-incrimination settled the case. 116 U.S. at 614. There was, however, no disagreement on the question of what gave rise to the Amendment itself.

> Warrant Clause was aimed specifically at the evil of the general warrant, often regarded as the single immediate cause of the American Revolution. But the first clause embodies a more encompassing principle. It is, in light of the *Entick* decision, that government ought not to have the untrammeled right to extract evidence from people.

The special genius of the Framers thus becomes apparent. For themselves, they placed in the Amendment the second clause to prevent the reoccurence of their own unfortunate experience. For succeeding generations, they placed in the Amendment the overriding committment of the first clause to the reasonableness of all searches and seizures. It seemed clear, moreover, at least up until this Court's decision in *Olmstead* v. *United States*, 277 U.S. 438 (1928), that the concepts of "search" and "seizure" were to be "liberally construed." *Boyd* v. *United States*, 116 U.S. at 640. To the degree that *Olmstead* departed from the teaching of *Boyd*, cf. *Lopez* v. *United States*, 373 U.S. 427, 459 (1963) (Brennan, J. in dissent), it was wrongly decided, and it ought now to be overruled. The question here should turn on "reasonableness" not on "search and seizure." [100]

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[100] The Court's judgement in *Olmstead* rested on two propositions. There was no trespass, so there was no "search"; there was no tangible taking, so there was no "seizure." 277 U.S. at 464. This Court's decision in *Silverman* v. *United States*, 365 U.S. 505 (1961) *sub siliento* overruled the second proposition, cf. *Wong Sun* v. *United States*, 371 U.S. 471, 484 (1963); it is now time under the circumstances of this case to lay to rest the first. Electronic surveillance invades privacy whether or not a trespass has occurred. It should be brought with the limitations of the Amendment. Cf. 365 U.S. at 512 (Douglas, J,). Unless and until other forms of surveillance undergo similar technological revolutions, however, there is no reason now to go beyond this Court's judgement in *Lee* v. *United States*, 274 U.S. 559, 563 (1927) (Brandeis, J.): "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution."

While there is "no formula," *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931), or "no ready litmus-paper test," *United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950), for determining the "reasonableness" of a scheme of court order electronic surveillance, this Court, in considering the question of constitutionality with *Olmstead* put to one side, is not without guides. The decisions of the Court itself in three areas are relevant: those dealing with search warrants under the Warrant Clause, those generally dealing with other instances of electronic searches and seizures, and those dealing with "constructive" searches and seizures under the Reasonableness Clause. But we must, of course, begin first with an analysis of the statutory scheme itself.

Section 813-a of New York Code of Criminal Procedure, in relevant part, provides:

> An . . . order for eavesdropping . . . may be issued by any . . . judge . . . of New York upon oath or affirmation . . . that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person . . . whose communications . . . are to be overheard . . . and the purpose thereof, and, in the case of a . . . telephonic communication, identifying the particular telephone . . . involved.*** Any . . . order shall be effective . . . for . . . two months unless extended.

2. A court order system is reasonable.

We must begin with the recognition that Section 813-a does not envision the "unbridled,"[101] "unwarranted,"[102]

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[101] *Hoffa* v. *United States*, 35 L.W. 4058, 4065 (1966) (Warren, Chief J. dissenting).

[102] *Lewis* v. *United States*, 35 L.W. 4072, 4074 (1966) (Warren, Chief J. for the Court).

"unauthorized," [103] or "indiscriminate" [104] electronic search and seizure so often rightly condemned by this Court and its various members. That sort of electronic surveillance is clearly unreasonable by any test. New York, however, has done here precisely what Mr. Justice Murphy suggested in dissent in *Goldman* v. *United* States, 316 U.S. 129, 140 n. 7 (1942) should be done—it has "devised" a "warrant" to "permit" the "use" of electronic surveillance devices. Normally, of course, "the choice should be his as to what . . . (a person) wishes to reveal . . . ." 316 U.S. at 137. Yet this general rule must be subject to the "right" of the "Government" to "seek out crime under a procedure with suitable safeguards for the protection of individual rights . . . ." *Id.* Such a protection is a "warrant whose requisites" meet the test of "the Fourth Amendment." *Id.* What Mr. Justice Murphy suggested could be done, and what New York did, moreover, has only this term found the strong approbation of this Court in *Osborn* v. *United States,* 35 L.W. 4067 (1966).[105] There, a recording device received "judicial authorization" in "response to a detailed factual affidavit . . . ." 35 L.W. at 4069. The device was to be used for "a particularized purpose." *Id.* This Court upheld its use, observing, "There could hardly be a clearer example of 'the procedural antecedent justification before a magistrate that is central to the Fourth Amendment' as a precondition of lawful electronic surveillance." [106] Section 813-a thus requires that

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[103] *Silverman* v. *United States,* 365 U.S. 505, 509 (1961) (Stewart, J. for the Court).

[104] *Lopez* v. *United States,* 373 U.S. 427, 441 (1963) (Warren, Chief J. concurring).

[105] The facts of *Osborn* involved not "electronic surveillance" as that phrase is used in this brief, but "recording." Nevertheless, it seems clear that the decision stands for the proposition that "judicial authorization", 35 L.W. at 4069, is a factor in any equation of reasonableness in this or similar areas.

[106] The Court at this point cited the dissenting opinion of Mr. Justice Brennan in *Lopez* v. *United States,* 373 U.S. 427, 464 (1963).

the law enforcement officer bring his "reasonable ground"[107] to a judge, the "neutral and detached magistrate," *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), that this Court has so often held to be of the essence of the Fourth Amendment. Cf. *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement officers the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime. (It is only then that) the right of privacy must reasonably yield to the right of search.[108]

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[107] No constitutional point should turn on the use of "reasonable ground" rather than "probable cause." The two phrases have been held by this Court to mean substantially the same thing. *Draper* v. *United States*, 358 U.S. 307, 310 n. 3 (1959).

[108] It has been suggested that judges cannot be relied upon or there will be form shopping. *The Wiretapping Problem Today* 14-15 (A.C.L.U. Report 1965 rev.). Apart from the libel this constitutes on our judiciary, cf. Williams, "The Wiretapping-Eavesdropping Problem: A Defense Counsel's View," 44 *Minn. L. Rev.* 855, 869 (1960), it fails to take into account the criminal process as a whole. If the officer is conviction-minded (if he is not, all bets, save the criminal law itself, are off anyway), he must plan, not only to secure his search warrant, but to survive the motion to suppress at trial. The search warrant will be issued ex parte; the motion to suppress will be made in an adversary context. The application for the search warrant must, therefore, survive two tests. No one suggests that the second with suitable appellate review based on the original papers, cf. *Aguilar* v. *Texas*, 378 U.S. 108 (1964), is not adequate. Cf. *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950) ("sufficient precaution" that "justification" be made "at trial"). It has been, moreover, under precisely this sort of review that suppression sanction states have improved their criminal procedure. *President's Report* at 202. Experience such as that cited in the A.C.L.U. Report, therefore, is today dated by *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The statute finally requires that the judge's order be limited as to "person," as to "communication," in "time," and in "purpose," again, squaring with the tests of *Osborn*.[109]

On what grounds, then, are such orders to be thought unreasonable under the Fourth Amendment? Mr. Justice Brennan in dissent in *Lopez* v. *United States*, 373 U.S. 427, 463 (1963) aptly summarized the standard objections in these terms:

> For one thing, electronic surveillance is almost inherently discriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult; for another, words, which are the objects of an electronic seizure, are ordinarily mere evidence and not the fruits or instrumentalities of crime, and so they are impermissible objects of lawful searches under any circumstances . . ., finally, the usefulness of electronic surveillance depends on lack of notice to the suspect.

2. No indiscriminate search and seizure is authorized.

Search and seizure of oral communications presents problems not constitutionally different from search and seizure of written communications. Existing case law in two areas makes the point clearly: the search warrant for tangibles and the subpoena for documents. "It is important", Mr. Justice Frankfurter reminded us in *Davis* v. *United States*, 328 U.S. 582, 612 (1946) (Frankfurter, J. in dissent) "to keep clear the distinction between pro-

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[109] Because the orders are "surrounded by every safeguard of judicial restraint, the expressed fears of unwarranted intrusion upon personal liberty are effective to recall Mr. Justice Cardozo's reply to the same exaggerated foreboding in *Jones* v. *Securities & Exchange Commission:* 'Historians may find hyperbole in the sanguinary simile.'" *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946) (Subpoena enforcement case).

hibited search . . . and improper seizure . . . ." The indiscriminate search and seizure objection to the use of electronic surveillance techniques, however, confuses precisely this distinction, that is, the distinction between the initial search and ultimate seizure in the execution of the search warrant. Putting aside the question of the preprocess justification, which must, of course, be keyed to object, place, and purpose, every search and seizure is at first indiscriminate. Suppose, for example, a search warrant is issued for all copies of a certain multi-copy letter or document thought to be located in a specified building. *Compare, Schenck* v. *United States,* 249 U.S. 47 (1919) (Holmes, J.—Search warrant for illegal leaflets sustained). To find all copies of the letter or document, the officer validly executing the search warrant would have to examine every piece of paper on the premises which might reasonably be the specified letter or document. No piece of paper could go unexamined or unread, no matter who wrote it or however innocent or intimate its contents. Only after all were initially "searched" would it be possible to make the ultimately discriminate "seizure" constitutionally authorized by the search warrant. *Compare, Marron* v. *United States,* 275 U.S. 192, 196 (1927).[110] This

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[110] The *Marron* decision holds that items not specified in a search warrant may not be seized during the search even though they are properly otherwise subject to seizure. 275 U.S. at 196. What then of the situation, for example, where an electronic surveillance order is issued for narcotics and evidence of murder is overheard? Putting aside the question of the continuing validity of the *Marron* rule, *compare, Harris* v. *United States,* 331 U.S. 145 (1947) (Evidence of other than arrested for crime may be seized incident to arrest); *Abel* v. *United States,* 362 U.S. 217 (1960) (Evidence subject to seizure may be taken); *Johnson* v. *United States,* 293 F.2d 539 (D.C. 1961); *United States* v. *Eisner,* 297 F.2d 595 (6th 1962) *(Harris* held to modify *Marron),* there seems to be no reason why the officers could not return to the issuing or another judge, demonstrate that the initial order was applied for in good faith for narcotics, show that it was properly executed, and then get a

is precisely what occurs in the use of court order electronic surveillance under Section 813-a. While it is not possible to specify beforehand the precise words which will be initially recorded, it is possible to describe the category within which they must fall. Conversations may range over many subjects, but they do admit of classification. This Court has repeatedly recognized that the requirement of particularity is keyed to the subject matter of the seizure. *Compare, Steele* v. *United States,* 267 U.S. 498, 504 (1925) ("cases of whiskey"), with, *Stanford* v. *Texas,* 379 U.S. 476, 478-79 (1965) ("Communist Party" "books and records"), *and, Marcus* v. *Search Warrant,* 367 U.S. 717, 731 (1961) ("obscenity"). Under an electronic surveillance order, we suggest, "search is a functional process. (It) . . . is not completed until effective appropriation, as part of an uninterrupted transaction is made of (evidence) . . . . for subsequent proof of an offense." *Lustig* v. *United States,* 338 U.S. 74, 78 (1949) (Frankfurter, J.) (Participation by federal officer found in state search). Not until the tapes have thus been reviewed, the conversations classified according to presearch standards, and the information contained on the tapes affirmatively used does the seizure take place. This process is constitutionality indistinguishable from practice always and everywhere held constitutional. An examination of a letter or document during a search alone does not constitute a seizure—otherwise all searches and seizures would be general; the seizure take place when it is finally reduced to possession and then used affirmatively

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new order allowing them to use the evidence of the murder. No one suggests that the officers who find other material not described in the warrant during a lawful search cannot seek a new warrant to seize it. *Compare, United States* v. *Joines,* 258 F.2d 471 (3rd), *cert. denied,* 358 U.S. 880 (1958) (Still found looking for person). Indeed, it is not altogether clear why, with this kind of showing at trial, the other evidence could not be there used. See *New York* v. *Scandifia,* decided Dec. 28, 1966, as reported in, *New York Times,* Dec. 29, 1966, p. 1, col. 1.

by the officer. More ought not be required here. The analogy is not perfect, but then there is no reason to read the constitution in these circumstances "with the literalness of a country parson interpreting the first chapter of Genesis."[111] "Otherwise", Mr. Justice Murphy reminds us in *Goldman* v. *United States*, 316 U.S. 129, 138 (1942) (Murphy, J. in dissent), "it may become obsolete, incapable of providing the people of this land adequate protection." Search and seizure of written and oral communications thus present the same problems; they should be resolved in the same way.

The indiscriminate search and seizure objection must also be placed in the context of this court's holding in the area of the "constructive search," another example of "search" for written communications. Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 202-04 (1946). In *Boyd* v. *United States*, 116 U.S. 616, 635 (1886), this Court, of course, established the rule that the concepts "search" and "seizure" should be "liberally construed." Following that teaching, the Court in *Hale* v. *Henkel*, 201 U.S. 43 (1906) struck down a grand jury subpoena. Writing for the majority, Mr. Justice Brown observed:

> . . . an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. 201 U.S. at 76.

He then went on:

> Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable." *Id.*

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[111] Beisel, *Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court*, 36 (1955), quoted in Kamizar, "The Wiretapping-Eavesdropping Problem: A Professor's View," 44 *Minn. L. Rev.* 891, 912-13 (1960).

And, he finally concluded:

> A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. 201 U.S. at 77.

The Court also faced in *Henkel* the question of whether or not the rule of *Boyd* on the question of self-incrimination should or should not be extended to corporate papers. Finding that the corporation was a creature of the state, it refusel to do so. 201 U.S. at 74-75.

While the Court in *Henkel* struck down the subpoena, it was not too long until a not terribly dissimilar subpoena was upheld in *Brown v. United States,* 276 U.S. 134 (1928). There, all communications between January 1, 1922, and June 15, 1925, relating to the manufacture and sale of goods in eighteen categories were called for. This time the Court distinguished *Hale* and found that a "reasonable period" had been "specified" with "reasonable particularity." 276 U.S. at 143.

Largely as a result of the pressure for knowledge needed by the government in the context of a vastly different society from that of 1789, generated by many of the social and economic changes broadly alluded to in earlier sections of the brief,[112] this Court has greatly expanded the permissible scope of the "reasonable" subpoena. The law today, *United States* v. *Powell,* 379 U.S. 48, 57 (1964), was summarized by Mr. Justice Rutledge in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208-09 (1946) in these terms:

> Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to an order authorized by law and safeguarded by judicial sanc-

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[112] See generally, Davis I *Administrative Law* §§ 3.01-3.14 (1958).

tion, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the thing required to be 'particularly described', if also the inquiry is one the demanding agency is authorized by law to make and the material specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of 'probable cause, supported by oath or affirmation' literally applicable in case of a warrant is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized', also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of

> the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

Since *Hale*, too, this Court has recognized the true basis for giving the Fifth Amendment little or no operation in this area. In *United States v. White*, 322 U.S. 694 (1944), the Court faced the question whether or not to extend *Hale's* modification of *Boyd* to labor unions. No longer could the "creature of the state" rationale serve. Writing for the majority, Mr. Justice Murphy observed:

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. 322 U.S. at 700.

He continued:

> But the absence of that fact (incorporation by the state) as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective . . . . *Id.*

And, he finally concluded:

> Basically, the power to compell . . . arises out of the inherent and necessary power of the . . . government to enforce their laws . . . 322 U.S. at 700-701.

The close analogy of the "reasonableness" of the electronic surveillance order to the use of the modern subpoena is most clearly shown where the records under order are, in fact, telegrams. Cf. *Newfield* v. *Ryan*, 91 F.2d 700 (5th 1937), *cert. denied*, 302 U.S. 729 (1938) (Subpoena upheld over Fourth Amendment and Section 605 objections.) *But see, Hearst* v. *Black*, 66 App. D.C. 313, 87 F.2d 68 (1936). There is, we suggest, here, as in the case of the search warrant, no reason to treat the

search and seizure of oral communications substantially different from the "search and seizure" of written communications. The vast growth and change of our society has called forth many constitutional developments. *Compare, Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (Subpoena not enforced), *with, McGrain* v. *Daugherty*, 273 U.S. 135 (1927) Subpoena enforced), *and, F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298 (1924) (Subpoena not enforced), *with, United States v. Morton Salt*, 338 U.S. 632 (1950) (Subpoena enforced). Likewise, we suggest, the development of modern organized crime and corruption in our society calls here for similar developments. The words of the President in his Special Message on Crime of March 9, 1966, are relevant:

> The most flagrant manifestation of crime in America is organized crime. It erodes our very system of justice—in all spheres of government. It is bad enough for individuals to turn to crime because they are misguided or desperate. It is intolerable that corporations of corruption should systematically flaunt our laws. 112 Cong. Rec. 5146.

3. Seizure of communications is not unreasonable per se.

There is little charitable that may be said of the rule of *Gouled* v. *United States*, 255 U.S. 298, 309 (1921) that search may not be made for things of "evidenciary value only."[113] "It is revolting", Mr. Justice Holmes[114] once

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[113] Two comments of the commentators are illustrative of the general scholarly opinion of the rule: Corwin, "The Supreme Court's Construction of Self-Incrimination Clause," 29 *Mich. L. Rev.*, 191, 205 (1930): one of the "least defensible features of the court's system of doctrine in this field. . . ."; Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law," 49 *Calif. L. Rev.*, 474, 478-79 (1961): "The privacy of the individual . . . would be just as well served by a restriction on search to the even-numbered days of the month." See generally, *California* v. *Thayer*, 63 Cal.2d 635, 408 P.2d 108, 109 (1965) (Traynor, Chief J.).

[114] *The Holmes Reader*, 74 (Docket Books 1955).

remarked, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." His comments are here apt. The rule has been unanimously rejected by two of the most respected Supreme Courts in this country in *California* v. *Thayer*, 63 Cal.2d 635, 408 P.2d 108 (1965) (Traynor, Chief J.) and *New Jersey* v. *Biscaccia*, 45 N. J. 504, 213 A.2d 185 (1965) (Weintraub, Chief J.). Review here of their analysis and rejection of the rule would be superfluous argumentation. We "cannot improve on it." *On Lee* v. *United States*, 343 U.S. 747, 763 (1952) (Douglas, J. on Brandeis in dissent in *Olmstead*). The Court's attention is, therefore, respectfully referred to these opinions.

It is not altogether clear, moreover, that the *Gouled* rule, even if followed, should govern this situation. Here this Court ought to write "on a clean slate. Limitation on the kinds of property which may be seized under a warrant, as distinct from procedures for search and the permissible scope of search are not instructed in this context." *Schmerber* v. *California*, 384 U.S. 757, 767-68 (1966) (Brennan, J.) (Blood analysis not forbidden). The proper function of the Fourth Amendment here is "to constrain not against all intrusions as such, but against instrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.* If this Court should feel, however, that the rule is applicable, it is the rule, like that of *Olmstead*, and not section 813-a, which should be "much the worse" for the "encounter."[115]

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[115] Kamisar, "The Wiretapping-Easedropping Problem—A Professor's View," 44 *Minn. L. Rev.*, 891, 916 (1960).

4. The general requirement of notice is here inapplicable.

The objection of lack of notice to the person subject to electronic surveillance seems to pose an insuperable objection. Necessarily, the wiretrapper places no warning noise on the line when he intercepts a call, while in the execution of the traditional search or arrest warrant before entry into the home, it is necessary to announce your authority and purpose. *Compare, Miller* v. *United States,* 357 U.S. 301 (1958), *with, Ker* v. *California,* 374 U.S. 23 (1963). Yet historically the rule of announcement has not been applied inflexibly. This Court itself in *Miller* v. *United States,* 357 U.S. at 309, recognized, without necessarily approving them, that the common law rule was subject to exceptions, citing *Read* v. *Case,* 4 Conn. 166 (1822) (Danger to officer) and *People* v. *Maddox,* 46 Cal. 2d 301, 294 P.2d 6 (1956) (Traynor, J.) (Possibility of destruction of evidence). Necessity may thus reasonably dispense with procedural pre-conditions otherwise normally required. This Court has recognized that under the Fourth Amendment the possibility of the destruction of evidence lawfully subject to seizure might justify an entry without announcement. *Ker* v. *California,* 374 U.S. 23 (1963). Although the Court was sharply divided in *Ker,* the division primarily turned on the evidence in the record which was available to support the application of the exception and not to the existence of the exception itself. 374 U.S. at 60-63. Mr. Justice Brennan, the author of the dissent in *Ker,* moreover, writing for the Court in *Schmerber* v. *California,* 384 U.S. 757 (1966), recognized that even the requirement of a search warrant itself could be dispensed with under the Fourth Amendment in "an emergency, in which the delay necessary to obtain the warrant, under the circumstances, threatened" the destruction of the evidence. 384 U.S. at 770. Here, of course, pre-surveillance notice would render the order of the court moot. Under these circumstances, therefore, it does not seem altogether unreasonable to recognize here, as else-

where, a limited exception to the otherwise sound general rule of notice.

To summarize, placed in the long context of the growth and development of our commitment to the requirement of the reasonableness of search and seizures, it does not seem, we suggest, that all electronic surveillance should stand condemned under the Fourth Amendment. Where, as here, such surveillance is authorized under strict limitations, and carefully employed, it is constitutionally unobjectionable. It is not the "dirty business" rightly condemned by Mr. Justice Holmes.[116] It is not the "unjustifiable intrusion" rightly condemned by Mr. Justice Brandeis.[117] It is instead a reasonable law enforcement investigative procedure made necessary by the development of

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[116] *Olmstead* v. *United States*, 277 U.S. 438, 470 (1928) (Holmes, J. in dissent). Those "who seek to legalize law enforcement tapping or eavesdropping soon find that they are 'toiling uphill against that heaviest of all argumentative weights—the weight of a slogan.'" Kamisar, "The Wiretapping-Eavesdropping Problem—A Professor's View," 44 *Minn. L. Rev.*, 891, 986 (1960). Yet it seems clear that Mr. Justice Holmes was only referring to wiretapping in violation of a statute. He did not reach the constitutional question in his famous dissent, 277 U.S. at 469. Here, of course, we have a statute. Consequently, reference to Holmes' statement is, we suggest, inapposite.

[117] *Olmstead* v. *United States*, 277 U.S. 438, 477 (1928) (Brandeis, J. in dissent). It has not often been noted, but a careful reading of Mr. Justice Brandeis' dissent indicates, not that he was condemning wiretapping as such, but "wiretapping as was practiced in the case" before him. 277 U.S. at 472. The record shows, moreover, that the wiretapping there was truly indiscriminate and unrestrained. See generally, Murphy, *Wiretapping on Trial* (1965). In addition, it seems clear Mr. Justice Brandeis was not arguing for an absolute "right to be let alone", but only a right to be free from "unjustifiable intrusion." 277 U.S. at 477. Here, of course, the statute provides a means whereby officers may seek pre-search justification for the intrusion incident to electronic surveillance.

modern organized crime and corruption.[118] Given proper administration and sensitive judicial review, it is not too much to ask of each citizen that he run the risk of this limited sort of electronic surveillance. *Compare, Rathbun* v. *United States,* 355 U.S. 107, 111 (1957); *Lopez* v. *United States,* 373 U.S. 427, 439 (1963); *Hoffa* v. *United States,* 35 L.W. 4058, 4060-61 (1966).[119]

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[118] It has been suggested that those who advocate electronic surveillance advocate that the "end" justifies the "means."[1] *Osborn* v. *United States,* 35 L.W. 4067, 4076 (1966) (Douglas, J. in dissent). This view is mistaken. Indeed, the rejection of electronic surveillance out of a deeply held concern for privacy may be said to fall under the same stricture. What else is it but a preference for privacy (end) over justice (means). For the ends-means argument to be other than hopelessly illogical, see generally, Kamisar, "The Wiretapping-Eavesdropping Problem—A Professor's View," 44 *Minn. L. Rev.* 891, 986-906 (1960), it must be restated to say that not *any* end can justify *any* means. Cf. Maritain, *Man and State,* 54-75 (Phoenix 1951). And when this is done, the test is seen to be but a reformulation of the balancing test which must be employed in any determination of "reasonableness" and not an independent general rule which automatically rejects electronic surveillance per se.

[119] Cf. the observations of Judge Chase in *Goldman* v. *United States,* 118 F.2d 310, 314 (2nd), *aff'd,* 316 U.S. 129 (1942):

> Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided (there is no violation of the Fourth Amendment or Section 605).

The use of this equipment, moreover, has positive civil liberties implications. Most of the crucial problems now associated with the troubling mass conspiracy trial—ambiguous circumstantial evidence or possibly suspect accomplice testimony, cf. *Hoffa* v. *United States,* 35 L.W. 4058, 4065 (1966) (Warren, Chief, J.), prejudicial variance where multiple conspiracies are proven, *compare, Berger* v. *United States,* 295 U.S. 78 (1935) (Prejudice found), *with, Kotteakos* v. *United States,* 328 U.S. 750 (1946) (Not found), termination of the conspiracy and the issue of the statute of limitations, cf. *Grunewald* v. *United States,* 353 U.S. 391, 396-97 (1957) or the co-conspirator declaration rule—are basically evidentiary. If we could raise the quantity and quality of the evidence, they would be materially reduced. More convictions would not only be secured, but fairly secured.

C. Court Order Electronic Surveillance Is Not Inconsistent with the No Compulsory Self-Incrimination Guarantee of the Fifth Amendment.

It is difficult to understand the precise basis for petitioner's challenge of Section 813-a under the Fifth Amendment.[120] If the challenge means no more than that evidence obtained in violation of the Fourth must be rejected under the Fifth, cf. *Olmstead* v. *United States,* 277 U.S. 438, 479 (1928) (Brandeis, J. in dissent),[121] then it is adequately dealt with, as above, by showing that no violation has occurred under the Fourth. We fail to see, in short, how the Fifth Amendment has independent meaning here. For as Mr. Justice Stewart observed for the Court in *Hoffa* v. *United States,* 35 L.W. 4058, 4061 (1966):

> . . . since at least as long ago as 1807 when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion.

Cf. *Holt* v. *United States,* 218 U.S. 245, 252-53 (1910) (Holmes, J.) ("physical or moral compulsion").

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[120] The Fifth Amendment, in relevant part, provides: "No person shall be . . . compelled in any criminal case to be a witness against himself. . . ."

[121] The majority opinion itself took up the question of the applicability of the Fifth Amendment. Writing for the Court, Chief Justice Taft observed:

> There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. 277 U.S. at 462.

This aspect of the *Olmstead* opinion was not then questioned by the dissenting Justices and has not been called into question since that time.

In *Hoffa*, this Court upheld a conviction based on admissions voluntarily made to a government informant. It found that "no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated . . . ." 35 L.W. at 4061. We see no meaningful distinction between a live informant and an electronic device on the question of compulsory self-incrimination.[122]

This case is likewise squarely within the orbit of *Stroud* v. *United States*, 251 U.S. 15 (1919). That the communication was written or oral should make no difference. *Compare, Ex Parte Jackson*, 96 U.S. 727, 733 (1877), *with, Olmstead* v. *United States*, 277 U.S. 438, 475 (1928) (Brandeis, J. in dissent). In *Stroud*, letters were lawfully seized and used to convict a defendant of murder. This Court upheld the conviction finding that "there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights" under the Fourth and Fifth Amendments. 251 U.S. at 22. We submit, therefore, that no violation has occurred here of the compulsory self-incrimination guarantee of the Fifth Amendment.

CONCLUSION

"It is of great importance in a republic", Madison observed in the *Federalist*, No. 51 at 339 (Modern Library 1937), "not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." For

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[122] *Hoffa* also establishes that there is no room here for invoking the Sixth Amendment's right to counsel. No one has a right to be arrested and until he is taken into custody, no warning need be given at least prior to indictment. 35 L.S. at 4063. *Compare, Illinois* v. *Escobedo*, 378 U.S. 478 (1964) *and Missiah* v. *United States*, 377 U.S. 201 (1964), *with, Miranda* v. *Arizona*, 384 U.S. 436 (1966). Cf. *United States* v. *Grier*, 345 F.2d 523, 524 (9th 1965).

this reason, a special prosecutor was appointed in 1935 in New York County. Within ten years he and his successor had broken the back of an alliance between politics and organized crime in that county and had brought to justice more of the leaders of organized crime than any other law enforcement office in the nation. That success was attributable to honesty, competency, committment, adequate personnel resources, and necessary legal tools, chiefly electronic surveillance. The challenge that faced that prosecutor in 1935, and which is still with us today, is now a problem which is fast becoming generalized throughout the United States. This brief has reviewed in some detail the nature of that problem. It has, in addition, given attention to our constitutional traditions. There is nothing, we suggest, in those traditions which would require that problem must be faced without the legal tools necessary to get the job done.

For the above reasons, therefore, it is respectfully submitted that the decision of the Court of Appeals of New York sustaining the constitutionality of Section 813-a be affirmed.

Respectfully submitted,

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